No. 13129

United States Court of Appeals

for the Ninth Circuit.

See vol. 2715

M. C. SCHAEFER,

Appellant,

vs.

SAM MACRI, DON MACRI, JOE MACRI, W. R. McKELVY and CONTINENTAL CASUALTY COMPANY, a Corporation,

Appellees.

Transcript of Record

In Two Volumes

Volume I

(Pages 1 to 266)

Appeal from the United States District Court, Western District of Washington, Northern Division.

Phillips & Van Orden Co., 870 Brannan Street, San Francisco, Calif.

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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In the District Court of the United States for the Western District of Washington, Northern Division

No. 2673 Civil

M. C. SCHAEFER, an Individual,

Plaintiff,

vs.

SAM MACRI, DON MACRI and JOE MACRI, Individuals; W. R. McKELVEY; CONTINENTAL CASUALTY COMPANY, a Corporation; A. J. GOERIG and CLYDE PHILP, Individuals,

Defendants.

COMPLAINT

I.

Jurisdiction is found on diversity of citizenship and amount.

Plaintiff is a resident of the State of Oregon, and Defendants are all residents of the State of Washington, except the Defendant, Continental Casualty Company, a corporation, which is doing business in the State of Washington, and the amount in controversy exceeds $3,000.00.

II.

That during the times herein complained of, Defendants conspired to injure, defraud and damage Plaintiff in the following particulars, to wit:

(a) Plaintiff at all times herein complained of

and for many years prior thereto, had been engaged in business as a concrete contractor and general contractor. On or about the 15th day of March, 1944, Plaintiff entered into a subcontract with the Defendants Sam Macri, Don Macri and Joe Macri, dba Macri & Company, pursuant to the terms of which Plaintiff was to build forms, place reinforcing steel, pour and finish certain concrete work on the Roza Irrigation Project near Yakima, Washington.

(b) Plaintiff posted bonds as required, and within the times stipulated entered into performance of said subcontract and with diligence pursued said work in conformity with the terms of the contract and the plans and specifications.

(c) Thereafter said Macri & Company grossly breached the terms of said subcontract by not paying sums due Plaintiff; by not furnishing suitable materials, by not supplying said materials timely, by not properly and timely performing the excavating and grading, all of which defaults by said Macris were seriously jeopardizing Plaintiff's financial condition and adding materially to Plaintiff's cost of performance.

(d) Plaintiff thereupon retained the services of the law firm of Skeel, McKelvey, Henke, Everson & Uhlmann of Seattle, Washington, and particularly Defendant W. R. McKelvey, made full disclosure of Plaintiff's financial condition; the defaults of said Macris in not making the required payments

to Plaintiff, in not furnishing suitable materials, in not supplying said materials timely, in not properly performing the excavating and grading, in not doing said excavating and grading timely and of two meetings between Defendant Sam Macri and Plaintiff out in the field on the project, all as aforesaid; and that they were bonded by Continental Casualty Company with both performance and payment bonds, and sought the services of the Defendant McKelvey to take action to terminate said subcontract on account of said defaults by said Macris and to sue on quantum meruit for services rendered to date, and also to terminate a second subcontract for similar work with said Defendants Macris on account of their defaults.

(e) That at all times from the date W. R. McKelvey, one of the partners in the said firm of Skeel, McKelvey, Henke, Everson & Uhlmann, was first retained until the ultimate termination of his contract of employment on or about the 20th day of October, 1945, said Defendant McKelvey took no action whatsoever to terminate said contract, or bring suit against said Macris for the reasonable value for the services rendered by Plaintiff or to compel said Macris to perform in accordance with said contract, and at all times said Defendant McKelvey urged Plaintiff to complete his said contract, which Plaintiff did.

(f) Thereafter, Defendant McKelvey advised Plaintiff that Defendant Macris were then judgment proof and suggested that the Plaintiff follow

certain courses of action that would be fraudulent as to creditors, which advice Plaintiff rejected. Defendant McKelvey thereafter continued to delay the taking of any action whatsoever against the Defendant Marcri and their bonding company as requested by Plaintiff, until Plaintiff became concerned about the statutes of limitation and on or about the 20th of October, 1945, inquired of Defendant McKelvey what the applicable limitations period was and then was informed that he had approximately one month left within which to file suit.

(g) At said conference on or about the 20th day of October, 1945, between Defendant McKelvey and Plaintiff, Defendant McKelvey then informed Plaintiff for the first time that he could not represent Plaintiff in any action against the Defendants Macri; that Macri Company was a good customer of Continental Casualty Company and that Continental Casualty Company was one of Defendant McKelvey's largest accounts.

(h) Plaintiff thereupon retained the services of an attorney in Yakima, Washington, who promptly investigated the facts and on or about the first day of December, 1945, made a written demand upon Defendants Macri for the payment of sums due Plaintiff for the performance of said work and gave the said Defendants Macri until the 15th day of December, 1945, within which to meet said demand, said notice specifying that in the event of said Defend-

ants' failure to do so, suit would promptly be instituted for collection of the same.

(i) That on or about the 14th day of December, said Defendants Macri filed a suit in the Circuit Court of the State of Oregon for the County of Multnomah, alleging damages suffered by themselves in the amount of $40,000.00 by virtue of Plaintiff's alleged breach of said second sub-contract for the performance of similar concrete work on another section of said Roza Irrigation Project.

(j) Said suit in Multnomah County, Oregon, was malicious, willful, without probable cause, and was filed for the sole purpose of and in fact had the effect of drying up Plaintiff's credit, causing him severe damage to his business in Portland, and reducing him to such an impecunious financial condition as to make virtually impossible the filing and prosecution of the threatened suit in Yakima.

(k) That despite the filing of said suit in Multnomah County, Oregon, Plaintiff did file suit in the Federal District Court in Yakima, Washington, on or about the 20th day of December, 1945, Plaintiff herein then appeared in said suit in Multnomah County, Oregon, and procured an order from the trial judge dismissing said suit on condition Plaintiff file in Seattle, which Plaintiff did and the trial court in addition also advised the said Defendants to file counter-claim in Plaintiff's suit in Yakima, Washington.

(l) After the filing of Plaintiff's suit in Yakima,

Washington, as aforesaid, against Defendants Macri and Defendant Continental Casualty Company, Defendant Continental Casualty Company then brought to Plaintiff's attention for the first time the fact that there should also be named as additional parties defendant in Plaintiff's said suit, a partnership composed of Defendants Clyde Philp and A. J. Goerig, who according to Continental Casualty Company, were partners with each other, that they entered into a joint venture agreement with the Macris in December, 1943. Plaintiff did, thereupon, amend his complaint so as to name as additional parties defendant, said Clyde Philp and A. J. Goerig. Plaintiff also discovered for the first time during the course of trial of said suit in Yakima, Washington, that Defendant Philp not only was a silent partner in the joint venture with Defendants Macri and Goerig, but also had signed as attorney-in-fact for Continental Casualty Company, the bonds posted by Defendants Macri. Plaintiff also discovered after the conclusion of the above suit, that Willard E. Skeel of the law firm of Skeel, McKelvey, Henke, Everson & Uhlmann, appeared as attorney of record for Defendant Continental Casualty Company on the first day of the trial of Plaintiff's said suit in Yakima, Washington, and Plaintiff had no knowledge of said suit coming on for trial on this the 21st day of February, 1947, and was not present or represented by his attorney on this date.

(m) Full trial was had upon the merit of Plain-

tiff's complaint, and of Defendants' answer and cross-complaint in Plaintiff's suit in Yakima, Washington, which ultimately resulted in judgment in the trial court in favor of plaintiff and against the Defendant of Plaintiff's suit for quantum meruit, and also in a judgment against Defendants and in favor of Plaintiff in the sum of One Dollar as to Defendants' cross-complaint. In furtherance of Defendants' concerted plan, appeal was taken from said judgment first to the Circuit Court of Appeals and finally to the Supreme Court of the United States, said litigation not being concluded until on or about the 9th day of November, 1949, at which time the draft issued by Continental Casualty Company was finally paid. Plaintiff having accepted said draft on November 4, 1949, at his attorney's office in Yakima, Washington, but only after two hours and ten minutes of argument with the attorneys for the Continental Casualty Company before they deleted three words on the reverse side of the draft which would in all probability have had the effect of precluding any possibility of Plaintiff maintaining this suit.

(n) That all of the actions aforesaid were the result of concerted action by Defendants, and each of them, in that Defendant McKelvey accepted the employment by Plaintiff, yet his entire action was detrimental and antagonistic to the interests of Plaintiff, and should never have been accepted by Defendant McKelvy because of conflicting interests of his former and then present client, the Defendant

Continental Casualty Company, and further in that Defendant McKelvey at all times herein complained of was fully aware of Plaintiff's precarious financial condition, of all facts pertaining to Defendants Macris' default, having personally gone upon the project on one or more occasions to observe for himself the defaults complained of; and having worked in close harmony with the attorney for the three Macris said attorney having formerly been associated in the same office with McKelvey.

(o) That the damages hereinafter complained of were the direct and proximate result of the breach of the attorney-client contract of employment between Plaintiff and Defendant McKelvey, in that said Defendant McKelvey failed to advise Plaintiff that he represented Continental Casualty Company, which had or might have a conflicting interest, and by not performing the services which he undertook and agreed to perform, and were the direct and proximate result of the concerted conspiracy of Defendants, and each of them, to injure, damage and defraud Plaintiff.

III.

That by reason and virtue of the intentional, concerted conspiracy of Defendants to injure, damage and defraud the Plaintiff, Plaintiff has suffered damages to his credit, to his business, to his reputation, has suffered serious monetary damage in the preparation and conduct of the aforesaid litigation, in that Defendant McKelvey neither rejected the employment by Plaintiff which he should have done

by reason of the conflicting interests between his client, Plaintiff herein, and his client, the Defendant Continental Casualty Company, nor by performing the services which he was employed by Plaintiff to do and also serious financial damage by reason of Plaintiff being required to spend practically his entire time for nearly four years in the preparation of and conduct of the litigation hereinabove referred to, thereby depriving him of the earning capacity which otherwise he would have enjoyed had he been allowed to use this time in the conduct of his other business affairs, all of said damages totaling the sum of $1,000,000.00.

For Second and Separate Cause of Action, Plaintiff alleges as follows:

I.

Plaintiff by this reference thereto, realleges all of the pertinent portions of Plaintiff's First Cause of Action, as though set out herein in full.

II.

Plaintiff further alleges that all of the acts and things complained of were willful and with intent to harm, damage, defraud and injure Plaintiff, and in fact did severally damage and injure Plaintiff, and by reason thereof Plaintiff is entitled to receive, in addition to the general or compensatory damages alleged in Plaintiff's First Cause of Action, punitive damages in the amount of $1,000,000.00.

Wherefore, Plaintiff prays that he have judg-

ment against Defendants, and each of them, on his First Cause of Action in the sum of $1,000,000.00; and, on his Second Cause of Action, in the sum of $1,000,000.00, together with his costs and disbursements.

/s/ M. C. SCHAEFER,
Plaintiff.

[Endorsed]: Filed Dec. 1, 1950.

[Title of District Court and Cause.]

MOTION TO DISMISS

Comes now W. R. McKelvy, one of the defendants above named, and moves the court for an order to dismiss the action against this defendant for the following reasons:

1. That no bond or stipulation for costs has been filed by the plaintiff; and, in the alternative, the motion to dismiss is denied, defendant moves that the plaintiff be required to file a stipulation for costs in the sum of $1000.

2. The complaint fails to state a claim against this defendant upon which relief can be granted.

3. The cause, if any, has been barred by the Statute of Limitations; that more than two years has expired since the commencement of any cause of action against this defendant.

4. That there is a misjoinder of causes of action.

5. That there is a misjoinder of parties defendant.

SKEEL, McKELVY, HENKE,
EVENSON & UHLMANN,

/s/ A. P. CURRY,
Attorneys for Defendant,
W. R. McKelvy.

[Endorsed]: Filed Dec. 21, 1950.

[Title of District Court and Cause.]

MOTION TO DISMISS FOR FAILURE TO STATE A CLAIM

The defendant Continental Casualty Company, a corporation, moves the Court to dismiss the action against Continental Casualty Company, a corporation, for the following reasons:

(1) The Complaint fails to state a claim against this defendant upon which relief can be granted.

(2) The action is barred by the Statute of Limitations.

/s/ CARL E. CROSON,

/s/ WILLARD HATCH.

Notice of Motion

To M. C. Schaefer, Plaintiff.

Please take notice that the undersigned will bring the above Motion on for hearing before this Court

at Room 609-611, United States Courthouse, Seattle, Washington, on the 9th day of January, 1951, at 10:00 o'clock in the forenoon of that day, or as soon thereafter as counsel can be heard.

/s/ CARL E. CROSON,

/s/WILLARD HATCH.

[Endorsed]: Filed Dec. 27, 1950.

[Title of District Court and Cause.]

MOTION TO DISMISS

I.

The defendants, Sam Macri, Don Macri and Joe Macri, move this Court for an Order to Dismiss plaintiff's First Cause of Action against them for failure to state a claim, and for the further reason that the action has not been brought within the time permitted by law.

II.

The defendants herein named move this Court to dismiss the Second Cause of Action against them for failure to state a claim in that punitive damages are not permitted in the State of Washington.

/s/ GRANVILLE EGAN,
Attorney for the Defendants, Sam Macri, Don Macri and Joe Macri.

[Endorsed]: Filed Jan. 15, 1951.

[Title of District Court and Cause.]

HEARING ON DEFENDANT
W. R. McKELVY'S MOTION TO DISMISS

Before: The Honorable John C. Bowen,
District Judge.

January 9, 1951

Appearances:

M. C. SCHAEFER,
Per Se Appeared for Plaintiff.

A. P. CURRY,
Appeared for Defendant W. R. McKelvy,

CARL E. CROSON, and
WILLARD HATCH,
Appeared for Defendant Continental
Casualty Company.

The Court: There is a matter on the calendar noted for today entitled Schaefer vs. Macri, et al., hearing on defendant's motion to dismiss.

Mrs. Curry: Defendant McKelvy is ready, your Honor.

The Court: Is anyone here representing the plaintiff Schaefer?

Mr. Schaefer: Here.

The Court: Is there anyone here representing Don Macri? Is there anyone here representing Continental Casualty Company?

Mr. Croson: Yes, Your Honor.

The Court: Will all attorneys and parties, if they are not too numerous, take a place at counsel table? Is there any other attorney present? Now, may I ask each of you at the counsel table to state your name and for whom you appear, if anyone?

Mr. Schaefer: This is Mrs. M. C. Schaefer.

The Court: Is she the wife of the plaintiff, M. C. Schaefer?

Mr. Schaefer: That is right, and my name is M. C. Schaefer, plaintiff in this case.

The Court: Are you represented by counsel?

Mr. Schaefer: I am not. I was unable to get counsel.

Mr. Hatch: My name is Willard Hatch, one of the attorneys for Continental Casualty.

Mr. Croson: Carl E. Croson, one of the attorneys for Continental Casualty.

Mrs. Curry: Alpha P. Curry, representing defendant W. R. McKelvy.

The Court: My understanding is the matter comes on at this time for a hearing on defendant's motion to dismiss, is that your understanding?

Mrs. Curry: It is defendant W. R. McKelvy, and I presume Continental Casualty——

Mr. Croson: Each of the two defendants has a motion to dismiss.

The Court: They have separate motions?

Mr. Croson: Yes, Your Honor.

The Court: Which one of you desires to speak first on behalf of the motion?

Mr. Croson: Mrs. Curry will speak first. Her motion was in first.

Mrs. Curry: Your Honor, I think that this is the first time I have ever seen a lawsuit brought against a lawyer because the client left the lawyer and hired another lawyer and won his lawsuit. At any rate, the complaint is voluminous and for the convenience of everybody concerned, in order to understand it, I have made an outline of it and attached it to the motion to dismiss.

The Court: Mrs. Curry, have you an opinion about how long you should speak?

Mrs. Curry: I think I can get by in ten minutes. Mr. Croson says it will take twenty minutes.

The Court: Mr. Schaefer, how long do you think you would like?

Mr. Schaefer: I have got a whole lot longer than that, I am sure.

The Court: Do counsel and those connected with this case feel it would be unfair to you if the Court gave other counsel an opportunity to finish the matter they began?

Mrs. Curry: Certainly not, Your Honor.

Mr. Croson: We yield readily, Your Honor.

Mrs. Curry: We prepared a motion to dismiss and served the plaintiff and submitted a memorandum of authorities treating the complaint a complaint in conspiracy. Today I have a supplemental memorandum of authorities and I will serve the plaintiff with the same.

The Court: Well you turn to the memorandum

of defendant W. R. McKelvy in support of the motion to dismiss, filed December 21, 1950, and look at line 20? "The motion should be dismissed because the complaint does not state a cause of action." Do you mean the "action," rather than the "motion," should be dismissed?

Mrs. Curry: The action or the cause.

The Court: Do you consent, and does anyone else have any objection, that I substitute the word "action" for "motion"? Is there any objection.

Mrs. Curry: It was a typographical error.

I think the first thing is to understand what the complaint says, before we discuss anything else with reference to it. Paragraph I, of course, is perfunctory; it states that the plaintiff is a resident of Oregon.

Paragraph II starts out with a general allegation that the defendants conspired to injure, defraud and damage the plaintiff. I have this at the end of my memorandum, or you can follow it in the complaint.

(a) Under paragraph II, alleges that the plaintiff presumably had a subcontract with the Macris named defendant on the Roza project.

(b) Alleges that he posted bond and proceeded with the subcontract.

(c) He alleges that Macris breached the contract, just a general allegation that they breached it.

(d) He alleges that upon the Macris' breach, he retained—I used the word employed, and that is stronger than the complaint, the complaint said

retained—the services of Skeel, McKelvy, Henke, Evenson & Uhlmann, and particularly W. R. McKelvy, and he thereupon disclosed his financial condition, disclosed the Macris' defaults in payments, disclosed the Macris' defaults in not furnishing the proper materials, disclosed the Macris' defaults in not supplying the material timely, disclosed the Macris' defaults in excavating, disclosed the Macris' defaults in not excavating timely; alleges two meetings, alleges that there were two meetings between Sam Macri and himself on the field; alleges that he told W. R. McKelvy that they—and "they" presumably means the Macris—were bonded by Continental Casualty.

He alleges that they were bonded for performance, and a payment bond, that is all he says, and he sought the services of this counsel

(1) To terminate the subcontract,

(2) To sue on quantum meruit,

(3) To terminate a second subcontract. What that was isn't mentioned.

Then he goes on and says—he doesn't say when he employed McKelvy—that from the time that W. R. McKelvy was first retained until the ultimate termination of his contract of employment on October 20, 1945, on the ultimate termination of his contract of employment on October 20, 1945, W. R. McKelvy took no action to terminate the contract, sue the Macris for plaintiff's services, or compel Macris to perform, and urged the plaintiff to complete his contract, which he did.

Then he said thereafter—presumably that would

be after October 20, when he got rid of McKelvy —W. R. McKelvy said, (1) The Macris were judgment proof; (2) Suggested actions which would be, in his opinion, in fraud of creditors; (3) McKelvy told him the plaintiff had only one month to sue the Macris, in answer to an inquiry as to what his time limitation was.

Then he alleges that McKelvy told him on October 20, 1945, when the contract for services with McKelvy was terminated, that he could not represent him in an action against the Macris, and the plaintiff thereupon employed a lawyer in Yakima who made a demand on the Macris.

Then he said—I do not know what it means—the Macris sued the plaintiff in Oregon, December 14, 1945, that was after he got rid of McKelvy, and that the Oregon case was malicious, willful, without proper cause, etc. Then he said that the plaintiff filed his suit in Yakima, December 20, 1945—presumably this is the suit against the Macris—and got the Oregon suit which the Macris apparently brought against him and for which McKelvy is not associated in any way, got the Oregon suit dismissed on certain conditions; namely, that he file in Seattle, and that the judge in Oregon gave him some advice to file in Seattle, which he did, and that this judge down in Oregon advised the Macris to file a counterclaim in the Yakima suit.

Then after the Yakima suit was filed, he said the Continental Casualty Company told him that they are named as defendants, were joint adventurers

with the Macris on this Rosa project, and the plaintiff amended his complaint, presumably the Yakima suit; and the plaintiff also discovered after conclusion of the above suit—I do not know what that means, but I presume it means the Yakima suit—that he discovered after the conclusion of the above suit that Willard Skeel of the firm of Skeel, McKelvy, Henke, Evenson & Uhlmann appeared as attorney of record for the defendant Continental Casualty Company in another lawsuit on the first day of the trial and was in another lawsuit on the first day of the trial of plaintiff's suit in Yakima—what connection that has I do not know—and that the plaintiff had no knowledge that that suit was coming to trial, but it does not allege that he was involved in it, on the 21st day of February in 1947, and was not present or represented by counsel on that day.

That was in 1947, and the trial was had in Yakima and the lawsuit resulted in judgment in his favor—that presumably is the suit that he wanted McKelvy to bring against the Macris and which he got another lawyer to bring—and also in judgment against the defendants in favor of the plaintiff on the defendants' cross-complaint of one dollar. I am quoting, "In furtherance of defendants' concerted plan," appeal was taken which concluded November 9, 1949, and Continental's draft was paid—judgment was paid, in other words, I presume—Continental's draft was paid, which was accepted by the plaintiff—he uses the word "accepted"—on No-

vember 4, 1949, after an argument resulting in the deletion of three words on the reverse side of the draft.

That all the actions aforesaid were the result of concerted action by the defendants and each of them in that W. R. McKelvy accepted employment by the plaintiff—but he was fired, his services were terminated on October 20, 1945. Yet his entire action was detrimental and antagonistic to plaintiff's interests and should not have been accepted by him because of his conflicting interests, and W. R. McKelvy was at all times aware of plaintiff's precarious financial condition and of the facts pertaining to the Macris' default, "and having worked in close harmony with the attorney for the three Macris, said attorney having formerly been associated in the same office with McKelvy."

What that means I do not know, but I think he means that Mr. Tom Holman represented someone in that lawsuit. Mr. Tom Holman used to be a member of Roberts, Skeel & Holman. That is the only thing I can judge, which was completely off the record, but you have to get off the record to get some sense out of this thing.

That the damages were the direct and proximate result of W. R. McKelvy's breach of contract and "were the direct and proximate result of the concerted conspiracy of defendants and each of them to injure, damage and defraud plaintiff."

Then Paragraph III alleges damages to be general damages to the credit, business, reputation,

serious monetary damage in preparation and conduct of litigation in Yakima, and loss of time in preparation and conduct of litigation. That is all there is on damages.

In the next cause of action, he asks for punitive damages and he asks for damages in the total sum of $2,000,000.00. I went over this complaint time and time again, and I took the trouble to make this analysis for my own convenience and attached it to the memorandum for the convenience of all counsel and the Court.

I couldn't see where there was any cause of action at all under any theory. It seems to me that what he said, that he came to McKelvy and employed McKelvy to bring a suit against the Macris, and after some time, we don't know how long, McKelvy told him he couldn't represent him, but before any suit was instituted against the Macris; and that then he went to another attorney and brought a lawsuit in Yakima and was successful. There is no question that McKelvy was ever involved in the litigation at all. He did not represent Continental; he did not represent any of the parties in that litigation. There isn't any allegation in the complaint, and actually the facts are that he wasn't associated in any way with that litigation.

Continental apparently bonded the Macris and Schaefer sued the Macris and of course Continental and got a judgment, I think in the sum of around $50,000.00, a very substantial judgment, and the defendants in that lawsuit appealed and judgment was

affirmed and Continental paid a draft and he got his money.

The only way to bring all these people in together on this would be on some sort of theory of conspiracy, and that is the first thing. He uses the word conspiracy, so I presume that was what he was trying to do. So I then, for his education, prepared a memorandum as to what conspiracy is. You have to have a combination of individuals in some manner to do an unlawful act or to do a lawful act unlawfully with a malicious intent. A conspiracy itself—there is no such thing as an action for conspiracy. It is only for the damages resulting from a conspiracy. There is no allegation of damages for any conspiracy here except a general allegation, and that is not sufficient.

Probably the Court remembers the famous Edith Ransom cases. Judge Neterer wrote two very strong, very clear opinions, apparently opinions written so that the lay person who was not represented by counsel would understand those cases.

In the first one, he pointed out that in that case she did allege causes of action of libel, of assault and various other things, but not a conspiracy, and he said there was no allegation of conspiracy but the fact that she alleged in it that the individuals, the employees of the two navigation companies, had conspired.

If you recall, she complained that they shanghaied her from Yokohama or Honolulu and shipped her over on two steamship lines to Seattle, and gave

her a shot of something or other to quiet her, and that she was shanghaied to Seattle. In one of those Ransom cases, the Court cites another case that Judge Neterer wrote, Puget Sound Power and Light Company vs. Asia, 2 F. (2d) 491. In that case they talked about the cause of action being based on a conspiracy to bring litigants to sue these people, and the Court said that a person fancying a right could sue and the law does not inquire into the motives, and that there has to be language in the complaint which alleged facts which lead to the inference that there was a conspiracy; that the word conspiracy is impotent in itself, that it is necessary to allege facts from which a natural inference is that a conspiracy existed.

That does not exist in this complaint. The fact that he employed McKelvy and McKelvy didn't do what he told him to is not a conspiracy with anybody, and there is no conspiracy alleged. There has to be a conspiracy to defraud that is malicious, intended to be malicious, and has to refer to conduct of the future, not past events. As Judge Neterer said, a conspiracy has to do things to be brought about and is a stranger to things that have passed.

There isn't a single fact alleged in this showing that the defendant McKelvy or any of the other defendants conspired with each other to do any injury at all to the plaintiff. The only allegation is that McKelvy didn't divulge that he represented Continental until October 20, 1945. If this is a cause of action in conspiracy, your Honor, it is barred

dressed to that proposition so far as the defendant McKelvy is concerned.

If he is attempting to allege a breach of contract, then that cause of action is barred by Sec. 159, three years from the breach, which, of course, occurred not later than October 20, 1945. If he is alleging a cause of action against McKelvy—I am talking about just defendant McKelvy—in fraud or malpractice, negligence, that cause of action is likewise barred by Sec. 159; and so far as a cause of action of fraud is concerned the facts were disclosed to the plaintiff Schaefer October 20, 1945, when he was advised by McKelvy that he could not represent him in litigation because of his prior association with Continental Casualty, and so all the facts so far as McKelvy is concerned, he had at that time, and if there were any fraudulent acts they were accomplished at that time, and the Statute of Limitations runs from that date.

But forgetting the Statute of Limitations, there is no cause of action in fraud. The only possible cause of action is for non-disclosure of the fact that McKelvy had an association with Continental Casualty which would make it impossible for him to represent Mr. Schaefer. Non-disclosure can of course be the basis of an action in fraud, but non-disclosure must be intentional and there is no allegation here that it was intentional. But if it was, there still would be no cause of action in fraud, because there is no casual connection between any fraud and the injuries shown.

He alleges, according to his complaint, a lay person can very well determine that he benefited by getting another counsel, as is not certain that McKelvy would have won his lawsuit.

Closely allied with that is the proposition that fraud without damage is not remedial. I think the case that most closely resembles this so far as application of the principle concerned is Miller vs. Williamson, 128 Wash. 124, a much stronger case. In that case a man guilty of fraud sold a man a note which had not been secured for good consideration. It was unquestionably a fraudulent transaction all the way through, but the plaintiff alleged that he took the note without notice of the fraud inherent in the note or fraud of any kind, and the Court said he pleaded himself out of court because he pleads himself to be a holder in due course, a bona fide holder in due course and could sue and collect on the note, and therefore he was not damaged.

In the case of Feldesman vs. McGovern, and, I think, the Easton case point out where there was a suit against a lawyer, that there was no allegation that a different result would have been obtained had the lawyer not been guilty of the act alleged.

In the case of Feldesman vs. McGovern the lawyer neglected or concealed the fact that he did not file a petition in bankruptcy and the complaint was demurrable because there was no allegation that if the petition had been filed it would have been granted.

There is another case, a like case, in which the Court held that there being no allegation that the

litigation would have been any different, there was no cause of action alleged and the complaint was demurrable. In Easton vs. Chaffee, 16 Wash. (2d) 183, a more or less modern case, the complaint alleged that the lawyer gave a man a paper and said it was an authorization to go before the commissioners when in fact it was a complaint, and the Court said he was not damaged by that, therefore, there was no cause of action. In that particular case, he would have to show that the lawyer misinformed him as to his rights and did it intentionally and deliberately.

As I recall, in that case the lawyer told the client that there was a lien or some assessments which he would have to pay, while the fact that the property going through a tax sale or a sale of that kind, the lien or taxes had been eliminated, and that was the only damages, and that not being alleged, there would be no cause of action.

There can be no cause of action in fraud because there is no damage alleged, and further, there is no fact showing that what McKelvy did inured to his injury in any particular.

The Court: I am sorry, I am going to have to interrupt you again. This morning for the first time I heard of this case. I did not know this case was going to be on today. I notice one of the defendants is a local lawyer, and I notice it is said that the plaintiff is a resident of Oregon and is a layman so far as the practice of law is concerned and is not represented by an attorney.

I would like to advise all connected with this case that we do have sitting in this court today and expected to continue during the next two weeks a visiting judge from Sacramento, California. I would like to ask the plaintiff if he would like this case heard before that judge. His name is Judge Lemmon. The case involves a local lawyer and a non-resident plaintiff not represented. Would that plaintiff like to have the case heard by a non-resident judge, a judge who does not live in the State of Washington?

Mr. Schaefer: No, Your Honor.

The Court: Are you sure that you will be as well satisfied with the result——

Mr. Schaefer: I believe so.

The Court: ——with me sitting on the case as if Judge Lemmon from Sacramento sat on the case?

Mr. Schaefer: I believe so, Your Honor.

The Court: Have you any objection to Judge Lemmon hearing the case? Will you consult with any friend or consider it with your wife while we have a short interruption for another matter? Sometimes litigants after litigation is finished look backward and have certain regrets about the procedures. I do not know of any reason why I could be disqualified or am disqualified to hear the case, but I advise the plaintiff, who is said to be a resident of Oregon and is not represented by an attorney, that one of the defendants is said to be a local lawyer. That lawyer sometimes appears in this court. Do you think—do not answer the question now, but I want you to consider it—do you think after the

case is over you will be just as well satisfied to have had the case heard before a local judge in whose court one of the defendants appears as a lawyer as you would to have the case heard before a visiting judge who is a resident of Sacramento, California, who may not know of and may not in the past have had appearing in his court anyone connected with this case?

That is the question you should consider, and I wish you to let me know your mature thought about it in a few minutes. I could arrange to have this case heard by Judge Lemmon, I believe, within the next two weeks. An interruption is taken in this case so that you may consider what you prefer. It would be satisfactory to me to try to arrange with Judge Lemmon for him to hear this case and dispose of it. I do not know what attitude the plaintiff and others connected with the case would have.

Mr. Schaefer: Your Honor, I think I will be very well pleased to have you keep right on with the case.

The Court: Do you think that no matter what the outcome of the case may be, you will feel the same afterwards?

Mr. Schaefer: I believe so.

Mrs. Curry: Your Honor, if you are not well, I was thinking this could be postponed.

The Court: Is your residence now in Portland, Mr. Schaefer?

Mr. Schaefer: Yes, Your Honor. If you are not well, as far as I am concerned I wouldn't like to put you to any inconvenience.

The Court: My thought is that in view of the facts that it promises to be lengthy in respect to the further arguments, and I do not know how long my cold is going to last, I am inclined to feel for that reason I should ask Judge Lemmon to hear the case, and he will arrange a time in the future when he would be able to hear it.

Mrs. Curry: Your Honor means by "the case," the motion?

The Court: I mean the whole case. Judge Lemmon is like any other judge; he will hear counsel in respect to their convenience about future hearings, if any, to be had.

Mrs. Curry: What if he goes down South?

The Court: I think the visiting judges usually consider all of those eventualities. I do not wish to place any limitations upon jurisdiction to handle the matter.

Mrs. Curry: I was thinking that it might work out to everyone's convenience to continue this for a week until you are feeling better.

The Court: I think the contingency of my cold is such that I should ask Judge Lemmon to hear it. Unless there is some objection to Judge Lemmon hearing it, I would like to make arrangements for him to do it.

Mr. Schaefer: I wouldn't have any objection, Your Honor. I would leave that up to you.

The Court: If you have no objection, I wish you would wait a few minutes for me to see if Judge Lemmon will take the case. Court is recessed for five minutes.

(Recess.)

The Court: I ask those connected with this case to come back at 1:30 to see if at that time I can contact Judge Lemmon. I will see what his attitude is about taking the case. I rather expect he will be agreeable to taking it. All those connected with the case are excused until 1:30 o'clock this afternoon, and the Court is recessed until that time.

Further Proceedings at 1:30 o'Clock P.M.

The Court: For the information of litigants and counsel in the Schaefer case, No. 2673, I advise you that Judge Lemmon has consented to a transfer of this case before him, and I am going to volunteer this statement about the matter for whatever it is worth to you. I know a great number of trial judges in the Ninth Circuit, and if I were a party to an action like this, either the plaintiff or one of the defendants, I do not know any one of the judges on the Federal Bench before whom I would feel more content to leave my case for decision than I would before Judge Lemmon. I do not know your view, but that is mine.

Judge Lemmon has also consented that you appear before him in his courtroom just before 2 o'clock p.m. today with a view to finding out from him when he can proceed with this hearing.

Mr. Schaefer, do you consent to this transfer?

Mr. Schaefer: I do, Your Honor.

The Court: Do each of the defendants so consent?

Mrs. Curry: Certainly, Your Honor.

Mr. Croson: Yes, indeed.

The Court: It is ordered that this case be——

Mr. Croson: Before Your Honor issues that order, might I request that Your Honor pass on the question of bond?

The Court: I think Judge Lemmon should do that. I prefer that he act on all the issues.

It is now ordered that this case, No. 2673 in this court, be and is now transferred to the calendar of Judge Dal M. Lemmon, a judge of this court by assignment and designation entered by means of an order signed by the Chief Circuit Judge of this Circuit, for any and all further proceedings which may occur in the case, and that means that the assignment from this court to Judge Lemmon is for all purposes. If there are any proceedings not completed by Judge Lemmon during the period of his assignment, Judge Lemmon thereupon will have power to make arrangements for further proceedings in the case.

Mrs. Curry: That is the only thing I was concerned about. I didn't want the litigation tied up, having to wait until the judge would come up here. If he has authority to transfer to another court for any other purpose, I would be quite satisfied.

The Court: He has just as much authority to send it to another judge as I have to send it to him.

Mrs. Curry: I didn't know whether that was so after a ruling.

The Court: I am certain of that. I have no doubt of it. In other words, he has full and complete authority with respect to the case just the same as I had before I announced this order a moment ago.

All of you might be interested to read the statute relating to the assignment to one district of judges from other districts, and particularly with reference to what continuing authority they may have in cases not completely finished by them during the stated periods of their assignment.

I will say to you that I am sorry that you had to spend all of this time before I realized that I felt these arrangements should be made. I did not know this case was on the calendar until this morning, and, of course, I did not realize the time that was involved in the matter.

I do wish to assure you that the principal reason I have for asking you to consent to this assignment is because I think it could on these motions involve not only today's work but very considerable additional time, and I have already enough work under advisement on my desk. I do not know how long this cold I have is going to last, and I thought, out of consideration for you, I should do what has been done, and I understand that all of you consent to it.

You may now be excused.

[Endorsed]: Filed Jan. 29, 1951.

[Title of District Court and Cause.]

ORDER OF DISMISSAL AND REQUIRING COST BOND

This matter coming on regularly for hearing before the undersigned Judge of the above-entitled Court upon the motion of the defendant, W. R. McKelvy, for an order to dismiss the above-entitled action as to said defendant and for a bond by plaintiff for security of costs; and the court having heard the argument of counsel for said defendant and the argument of the plaintiff per se and being fully advised in the premises does hereby find that said motion to dismiss should be granted upon the grounds and for the reasons that the complaint fails to state a claim against said defendant and the cause, if any alleged, has been barred by the statute of limitations of the State of Washington and that the plaintiff be required to file a bond for costs, Now, therefore,

It Is Hereby Ordered, Adjudged and Decreed that the plaintiff be and he is hereby required to file a bond for costs in this court in the sum of $250 on or before January 26, 1951; and

It Is Further Ordered, Adjudged and Decreed that defendant, W. R. McKelvy's motion to dismiss be and the same is hereby granted and the said action as to said defendant be and the same is hereby dismissed with the privilege to the plaintiff to amend the complaint herein within 30 days from

the hearing of the motion, to wit, within 30 days from January 11, 1951.

Done in Open Court this 7th day of February, 1951.

/s/ DAL M. LEMMON,
Judge.

Presented by:

/s/ A. P. CURRY,
Attorney for Defendant,
W. R. McKelvy.

Receipt of Copy acknowledged.

[Endorsed]: Filed February 7, 1951.

In the District Court of the United States for the Western District of Washington, Northern Division

No. 2673

M. C. SCHAEFER, an Individual,

Plaintiff,

vs.

SAM MACRI, DON MACRI and JOE MACRI, Individuals; W. R. McKELVY; CONTINENTAL CASUALTY COMPANY, a Corporation; A. J. GOERIG and CLYDE PHILP, Individuals,

Defendants.

ORDER OF DISMISSAL AS TO DEFENDANT CONTINENTAL CASUALTY COMPANY

This Matter having come on regularly on January 11, 1951, before the undersigned Judge of the above-entitled Court upon the Motion of the defendant Continental Casualty Company, a corporation, for dismissal of the above-entitled action as to the defendant Continental Casualty Company; the plaintiff being present in Court and being represented per se; the defendant Continental Casualty Company, a corporation, being represented by Carl E. Croson and Willard Hatch, its attorneys of record; argument having been heard; the Court being advised in the premises; and the Court having heretofore entered its oral decision on the 11th day of January, 1951, to the effect that the above-enti-

tled action should be dismissed as to the defendant Continental Casualty Company, a corporation, for the reason that the Complaint of the plaintiff fails to state a cause of action against this defendant upon which relief can be granted, and for the additional reason that the above-entitled action is barred by the applicable Statute of Limitations as to this defendant; now, therefore,

It Is Hereby Ordered, Adjudged and Decreed:

That the above-entitled action be and the same hereby is dismissed as to the defendant Continental Casualty Company, a corporation; and that the plaintiff be and he hereby is granted until February 10, 1951, time in which to file an Amended Complaint herein against said defendant.

Done in Open Court this 7th day of February, 1951.

/s/ DAL M. LEMMON,
Visiting District Judge.

Presented by:

/s/ CARL E. CROSON,

/s/ WILLARD HATCH, of
CROSON, JOHNSON &
WHEELON,

Attorneys for Defendant Continental Casualty Company, a Corporation.

[Lodged]: January 13, 1951.

[Endorsed]: Filed and entered February 7, 1951.

[Title of District Court and Cause.]

BOND FOR COSTS NON-RESIDENT

Know All Men by These Presents:

That the undersigned plaintiff, M. C. Schaefer, has deposited with the Clerk of the above-named court the cash sum of Two Hundred Fifty Dollars ($250.00) on this date, January 17, 1951.

Whereas, Plaintiff in the above-entitled action is a non-resident of the County of King and as such is required to provide security for costs and fees which may be awarded against him.

Now, Therefore, if M. C. Schaefer shall pay or cause to be paid all fees that must by law be paid to the Clerk, Marshal, or other officer of the Court and all costs of the action, which they may be required to pay, not exceeding the said sum of Two Hundred Fifty Dollars ($250.00), then this obligation shall be void; otherwise to remain in full force and effect.

/s/ M. C. SCHAEFER,
Plaintiff.

[Endorsed]: Filed January 17, 1951.

[Title of District Court and Cause.]

AMENDED COMPLAINT

I.

Jurisdiction is founded on diversity of citizenship and amount.

Plaintiff is a resident of the State of Oregon, and Defendants are all residents of the State of Washington, except the Defendant, Continental Casualty Company, a corporation, which is doing business in the State of Washington, and the amount in controversy exceeds $3,000.00.

II.

Plaintiff at all times herein complained of and for many years prior thereto, has been engaged in business as a Concrete Contractor and General Contractor.

III.

That during all the times herein complained of, beginning on 3/2/44 and ending on 8/18/50, Plaintiff suffered substantial damages, hereinafter more fully alleged, as the sole and proximate result of the overt acts (hereinafter alleged in detail) of defendants who did wrongfully and maliciously conspire, combine and confederate together with wilful and malicious intent to injure, defraud and damage Plaintiff.

(1) 12-7-1943: Macri Company signed the general contract with the Bureau of Reclamation.

(2) 12-7-1943: Clyde Philp, one of the Defend-

ants herein, signed as attorney-in-fact for the Continental Casualty Company, the performance and payment bonds posted by defendants Macri, and four days later, or on 12-11-1943, this same Clyde Philp, together with A. J. Goerig, entered into a silent partnership agreement with each other, and as joint venturers with the Macris in connection with the above-mentioned contract with the Bureau of Reclamation being job specification #1062 and also accepted the conditions of the bonds that had been posted by the said Macris, substantial copy of each of which said bonds is as follows:

Performance Bond

(Construction or Supply)

Know All Men by These Presents, That we, Sam Macri, Don Macri and Joe Macri, partners composing a firm, Macri Company, of Seattle, Washington, as Principal, and Continental Casualty Company, a corporation, organized and existing under the laws of the State of Indiana, as Surety, are held and firmly bound unto the United States of America, hereinafter called the Government, in the penal sum of sixty-five thousand and 00/100 ($65,000.00) dollars for the payment of which sum well and truly to be made, we bind ourselves, our heirs, executors, administrators, and successors, jointly and severally, firmly by these presents.

The Condition of This Obligation Is Such, that whereas the principal entered into a certain contract, hereto attached, with the Government, dated

December 7, 1943, for construction of earthwork, pipe lines, and structures, laterals 59.3 to 69.8 and sublaterals, under Schedule No. 1 of Specifications No. 1062, Roza Division, Yakima Project, Washington.

Now, Therefore, If the principal shall well and truly perform and fulfill all the undertakings, covenants, terms, conditions, and agreements of said contract during the original term of said contract and any extensions thereof that may be granted by the Government, with or without notice to the surety, and during the life of any guaranty required under the contract, and shall also well and truly perform and fulfill all the undertakings, covenants, terms, conditions and agreements of any and all duly authorized modifications of said contract that may hereafter be made, notice of which modifications to the surety being hereby waived, then, this obligation to be void; otherwise to remain in full force and virtue.

In Witness Whereof, the above-bounden parties have executed this instrument under their several seals this 7th day of December, 1943, the name and corporate seal of each corporate party being hereto affixed and these presents duly signed by its undersigned representative pursuant to authority of its governing body.

[Seal] /s/ SAM MACRI,
905 Tenth Ave. So.,
Seattle 4, Wash.

In the presence of
Niels H. Hjorth,
3739 Burns St., Seattle, Wn.

/s/ DON MACRI,
905 Tenth Ave. So.,
Seattle 4, Wash.

In the presence of
Niels H. Hjorth,
3739 Burns St., Seattle, Wn.

/s/ JOE MACRI,
905 Tenth Ave. So.,
Seattle 4, Wash.

In the presence of
Niels H. Hjorth,
3739 Burns St., Seattle, Wn.

[Seal] CONTINENTAL CASUALTY COMPANY,
Box 534, Yakima,
Washington.

By /s/ CLYDE E. PHILP,
Attorney in Fact.

Attest:
ELLA HOLT.

Payment Bond

(Construction)

Pursuant to the Act of Congress, Approved August 24, 1935—49 Stat. 1011

Know All Men by These Presents, That we, Sam Macri, Don Macri, and Joe Macri, partners composing a firm, Macri Company, of Seattle, Washington, as Principal, and Continental Casualty Company, a corporation, organized and existing under the laws of the State of Indiana, as Surety, are held and firmly bound unto the United States of America, hereinafter called the Government, in the penal sum of sixty-four thousand two hundred seventy-five and 48/100 ($64,275.48) dollars for the payment of which sum well and truly to be made, we bind ourselves, our heirs, executors, administrators, and successors, jointly and severally, firmly by these presents.

The Condition of This Obligation Is Such, that whereas the principal entered into a certain contract, hereto attached, with the Government, dated December 7, 1943, for construction of earthwork, pipe lines, and structures, laterals 59.3 to 69.8 and sublaterals, under Schedule No. 1 of Specifications No. 1062, Roza Division, Yakima Project, Washington.

Now, Therefore, If the principal shall promptly make payment to all persons supplying labor and material in the prosecution of the work provided for in said contract, and any and all duly authorized

modifications of said contract that may hereafter be made, notice of which modifications to the surety being hereby waived, then this obligation to be void; otherwise to remain in full force and virtue.

In Witness Whereof, the above-bounden parties have executed this instrument under their several seals this 7th day of December, 1943, the name and corporate seal of each corporate party being hereto affixed and these presents duly signed by its undersigned representative, pursuant to authority of its governing body.

[Seal] /s/ SAM MACRI,
905 Tenth Ave. So.,
Seattle 4, Wash.

In the presence of
Niels H. Hjorth,
3739 Burns St., Seattle, Wn.

/s/ DON MACRI,
905 Tenth Ave. So.,
Seattle 4, Wash.

In the presence of
Niels H. Hjorth,
3739 Burns St., Seattle, Wn.

/s/ JOE MACRI,
905 Tenth Ave. So.,
Seattle 4, Wash.

In the presence of
Niels H. Hjorth,
3739 Burns St., Seattle, Wn.

[Seal] CONTINENTAL CASUALTY COMPANY,
(Corporate Surety.)
Box 534, Yakima,
Washington.

By /s/ CLYDE E. PHILP,
Attorney in Fact.

Attest:
ELLA HOLT.

The rate of premium on this bond is xxxxx per thousand.

Total amount of premium charged, $ premium included in performance bond.

(3) Plaintiff did not know of these facts until after suit was filed in Yakima, Washington, or, on or about 1-17-1946.

(4) 3-2-1944: Received a letter from Macris' Job Superintendent, George Staples, asking Plaintiff for a bid on the concrete work for this job, being job specification No. 1062.

(5) 3-14-1944: The Plaintiff herein signed a sub-contract with the Macris in connection with this job specification #1062 pursuant to the terms of which Plaintiff was to build forms, place reinforcing steel, pour and finish certain concrete work on the Roza Irrigation Project near Yakima, Wash-

ington. Plaintiff posted bonds as required, and within the times stipulated entered into performance of said sub-contract and with diligence pursued said work in conformity with the terms of the contract and the plans and specifications.

(6) 4-21-1944: Plaintiff herein entered into a second sub-contract with the said Macris for similar work, said work being an extension of the work sub-contracted on 3-14-1944—this contract was on job specification #1068. Plaintiff was not required to post bond on this job. The said Macris had Plaintiff sign a sub-contract on this job on 4-21-1944, but unknown to Plaintiff said Macris at that time did not have a contract with the Bureau of Reclamation but signed a contract with the Bureau of Reclamation on or about 5-18-1944. The Defendants, Clyde Philp and A. J. Goerig, were also silent partners with the Macris on this job, being job specifications #1068. The general contract between the Macris and the Bureau of Reclamation on job specification #1068 called for work to commence within 30 days of the signing of said contract, but the general contractor did not commence any work for many months after the expiration of the 30-day period; in fact, Macris had not done any excavating and grading for structures on this job until in January of 1945 and none of said excavating and grading for structures on this job were ever done per plans and specifications. Defendants Macri, and Defendants Philp and Goerig, and Continental Casualty Company through its agent and attorney-

in-fact, the Defendant Philp, were attempting from the beginning of said sub-contract to bankrupt Plaintiff, ruin his reputation and credit, by not paying Plaintiff as per contract requirements, by not performing their part of the work, or else performing it badly, thereby increasing cost to Plaintiff and hampering and delaying Plaintiff and exhausting Plaintiff's operating capital.

(7) 4-29-1944: This is the date of the first big meeting in the field on job specification #1062 (after Sam Macri deliberately failed to keep an appointment on 4-28-1944). Memorandum of which was prepared immediately after said meeting and later delivered to Defendant McKelvy. See (16).

(8) 5-18-1944: Macris signed contract with the Bureau of Reclamation on job specification #1068 (see second paragraph hereabove under date of 4-21-1944 for additional details). Had Macri Company asked Plaintiff to sign a sub-contract on this job specification #1068 in the customary sequence which would then have been on or after 5-18-1944, Macris would have failed to have Plaintiff enter into said sub-contract as this was after the argument in the field on 4-29-1944.

Plaintiff did not perform any work on this job #1068.

(9) 5-22-1944: On this date Plaintiff withdrew all except two (2) of Plaintiff's men from job specification #1062 because of the defaults of said Macri's in not supplying the required lumber and

excavations. Plaintiff left these two (2) men on the job so that the Macris could not charge Plaintiff with having abandoned the job.

(10) 6-15-1944: This is the date of the second big meeting in the field on job specification #1062. Memorandum of which was prepared immediately after said meeting and later delivered to Defendant McKelvy. See (16).

(11) 6-29-1944: Plaintiff returned additional men to Job #1062.

(12) 7-15-1944: This is the date on which it is alleged that an agreement terminating the joint venture between the Macris and the silent partners Clyde Philp and A. J. Goerig was signed. This termination agreement, of course, was effective as to the Plaintiff but not effective as to the Continental Casualty Company, the Bonding agent. The following is a copy of the termination agreement as recorded in the transcript of record in the Yakima suit: Volume 1—Pages 52 to 58 Inc. Agreement terminating Joint Venture.

By Virtue of This Agreement, made and entered into on July 15, 1944, by and between Macri & Company, a co-partnership, herein referred to as First Party, and A. J. Goerig and Clyde Philp, individually and constituting a co-partnership as Goerig and Philp or A. J. Goerig Construction Co., herein referred to as Second Parties,

Witnesseth:

The parties hereto heretofore and on or about December 11, 1943, entered into each of the several joint venture agreements in relation to the following operations:

1. A corporation as formed under the name and style of Macri Development Company, for the purpose and intention of developing Real Estate and building, 194 Federal Housing Administration dwelling units, as per plans and specifications, between 135th Street South and 140th Street South, near the Pacific Highway south of Seattle in King County, Washington.

2. Contract No. 2912, construction on Secondary State Highway No. 1-S, Johnson & Jim Creek Bridges, Cowlitz County, Washington.

3. Contract No. 12r-14825, Spec. 1062, earthwork, pipelines and structures, Laterals 69.3 to 69.8 and sub-laterals and Diversion Channels, Roza Division, Yakima Project Washington.

4. Earthwork, pipelines and structures, Laterals 70.1 to 80.1 and sublateral, East Turbine Laterals Sta. 260-00 to end and sub-laterals East Turbine Lateral Wasteway and Diversion Channels, Mile 51.74 to Mile 58.45, Roza Division, Yakima Project, Washington.

5. The work to be done on Project 9536, Contract W7412-eng-1, duPongRPG-4344 being constructed at Richland, Washington, being known as

the Sewer and Watermain Facilities Richland, Subcontract No. 4, Richland, Washington, as it now exists.

That the parties hereto are desirous of terminating, cancelling and nullifying each of said joint venture agreements in relation to each of said operations, and now in consideration of the mutual engagements on the part of each of the parties hereto herein contained, and in further consideration of the mutual engagements on the part of each of the parties hereto herein contained, and in further consideration of the sum of Ten Dollars ($10.00) in hand paid by each of the parties hereto, one unto the other, it is now agreed that each of said joint venture agreements between the parties hereto in relation to each of said projects above described, 1, 2, 3, 4, and 5, are hereby and now mutually cancelled, terminated and ended as though they had never been entered into, saving unto the parties, however, the duties, obligations, liabilities and responsibilities as hereinafter set forth.

1. It is understood that in reference to the first four contracts or projects referred to hereinbefore, the contracts with the owners were entered into by first party and that second parties did not appear therein excepting as to the first project, this was a corporation formulated to carry on a building operation and second parties have advanced certain money in connection with said enterprise, credit for which second parties shall receive. Each of the said first four projects first party shall complete

and perform as expeditiously as possible and as required by their contract obligations, and in event first party sustains financial loss in respect to the performance of any of said projects or contracts, then when said loss is ascertained and determined, second parties will pay to first party on each of said projects upon which a loss may result 52⅓% thereof. In determining the amount, if any, which second parties shall pay to first party, each of said projects shall be treated separately and profit, if any, realized by first party on one or some of said projects shall not be taken into consideration as to any loss that may be sustained upon any of the others. In this respect, in order to ascertain profit and loss, each transaction shall be considered entirely separate.

2. As to Project 5, this contract with the owner was entered into by second parties directly with the owner, and first party does not appear therein, and second parties shall proceed with the performance of the same as though no joint venture agreement had ever been entered into in respect thereto, and second parties shall be entitled to receive all profits that may come, arise or grow in connection therewith, and shall themselves bear and pay any and all losses that may occur and shall save first party harmless from any legal liability or responsibility whatsoever in connection with the completion and performance of the same. (39)

3. Second parties shall pay to first party, as soon as the amount is ascertained, the equipment

rentals for the first party's two-hoe shovels on the basis of the rental agreement regarding the same heretofore used, and now being used by second parties upon Project 5, as aforesaid, and will likewise pay for the repairs that are required upon first party's Lorraine Shovel use, as being used by second parties on said Project 5.

4. In determining whether any loss on any of said projects results to first party, it is agreed that no rental on any of first party's equipment furnished and used on any of the same shall be charged, and it is further agreed that second parties are to charge no equipment rental against first party on Project 1, known and designated as "Val Vue Real Estate Development."

5. It is understood that in the settlement and adjustment now being made between the parties in respect to said joint ventures, second parties will transfer to first parties all of the corporate stock in Macri Development Company, a corporation, that has or in reference to which it may become necessary to issue to second parties or either of them, and that second parties shall receive a credit therefor from first parties of $37,500.00. That second parties upon Project 5 are to receive or be credited with, as between the parties, the sum of $56,604.00, and the difference between said sums of $37,500.00 and $56,604.00, or the sum of $19,104.00 is now acknowledged as having been paid by second parties to first party concurrently with the execution and delivery of these presents.

6. It is further agreed and understood that there are other joint ventures between the parties hereto that are not mentioned herein, some of which have been completed, but in connection with which final payments have not been received by the owners, some of which are in the process of construction looking toward completion. That in respect to none of these shall the relationship of the parties in any respect be changed by this agreement, and that their relationship as joint venturers is only concluded in respect to those hereinbefore specifically described and mentioned and that their relationship in respect only to those are hereby terminated and ended and as herein specified. (40)

7. It is further agreed that certain funds of a joint venture between the parties hereto, commonly referred to as Stadium Homes, a housing project being constructed in Seattle, Washington, have been diverted to some or all of the first four projects or operations as hereinbefore described. First parties now agree to forthwith and immediately cause said diverted funds to be returned to the bank account of the Stadium Homes joint venture, in which all of the parties hereto are jointly interested, and not allow any subsequent diversion or diversions of the funds of that joint venture in aid or in assistance of any of first party's subsequent operations, without second parties' written consent.

8. It is further understood and agreed that this arrangement as hereinbefore specified between the

parties is done and accomplished in a spirit of cooperation and friendship between all the parties hereto, and that either of the parties hereto will, if called upon by the other parties, give and render every possible assistance, one unto the other, in the completion of any or all of said projects. If the rendition of such cooperation and assistance by one party unto the other in this respect involves financial expenditures subsequent hereto, reimbursement by one party unto the other shall be determined and settled when the assistance is sought or obtained.

9. In connection with the completion of the organization of Macri Development Company, a corporation, and the preparation of its books, records, and the issuance of its corporate stock, and particularly by Clyde Philp, one of the second parties who has been elected secretary of said corporation and has performed duties in that capacity, each of second parties shall sign any and all additional papers or documents as and when their signatures are required, in order to expedite and complete all of the business affairs of said corporation and enable it to arrange its books of account, corporate records, and financial set-up along the lines as originally agreed upon between the parties. It is understood, however, that Clyde Philp, concurrently with the execution of these presents, is resigning as secretary of said corporation, but agrees to continue to act as such until the acceptance of his resignation by the Board of Directors of said corporation has been accomplished.

In Witness Whereof the parties hereto have caused these presents to be executed and delivered the day and date first above written.

MACRI & COMPANY,
By DON MACRI,
One of Said Firm, But Authorized to Act in This Matter for It, First Party.

CLYDE PHILP,
A. J. GOERIG,
Individually and d/b/a Goerig & Philp and/or A. J. Goerig Construction Co., Second Parties.

[Endorsed]: Filed July 5, 1946. (42)

(13) Plaintiff did not know of these facts until after suit was filed in Yakima, Washington, or, on or about 1-17-1946.

(14) 7-31-1944: Date Plaintiff was first able to pour concrete on this job specification #1062 despite the fact that Plaintiff had an oral agreement that the Macris would facilitate their own work so that Plaintiff could be through with all of Plaintiff's work on both of these jobs, specifications #1062 and #1068, by September 15, 1944. This oral agreement was entered into at the time of the signing of the sub-contract on job specification #1068. It was affirmed right after the signing of this said contract and a number of times thereafter up to the time of September 15, 1944, and thereafter Plaintiff has made the statement that such an agreement existed and the Macris have admitted the same.

That said conspiracy was joined by Defendant McKelvy on 11/1/44 and furthered by him as more fully appears from the following facts:

(15) 10-31-1944: Mr. Colomb of Glens Falls Indemnity Company, Plaintiff's Bonding Company, came to Plaintiff's office in Portland, Oregon, and in the course of their conversation, Mr. Colomb asked Plaintiff if he had an attorney to handle Plaintiff's proposed suit against the Macris & Continental Casualty Company. Plaintiff stated that he had a local attorney, but as of that time his Portland attorney had not yet contacted an attorney in Washington, and that Plaintiff was preparing the necessary data to present to such Washington attorney. Mr. Colomb asked if he could suggest an attorney in Seattle. Plaintiff said, "yes, I will appreciate it if you do." Mr. Colomb then suggested that Plaintiff contact Mr. McKelvy of the firm of Skeel, McKelvy, Henke, Evanson and Uhlmann and wrote an introduction on the back of his card and said, "I'll give him a call and let him know you are coming up to see him." Plaintiff said, "O.K.," so then Mr. Colomb called the McKelvy office and told someone of that office that Plaintiff would be up to see him in regard to filing a suit against the Macris in connection with a sub-contract on work on a job near Yakima.

(16) 11-1-1944: On or about this date Plaintiff employed Mr. McKelvy to file a lawsuit in Quantum Meruit against the Macris and the Continental Casualty Company on job specification #1062 Roza

Project, Yakima, Washington, and to terminate the second sub-contract on job specification #1068 because of Macris breaches of said contract, specification #1068. Plaintiff at this time made full disclosure of Plaintiff's financial condition; the defaults of said Macris in not making the required payments to Plaintiff, of the verbal agreement that Plaintiff was to be able to complete both contracts, Job specifications #1062 and #1068 by September 15, 1944, of Macris defaults in not furnishing suitable materials, in not supplying said materials timely, in not properly performing the excavating and grading, in not doing said excavating and grading timely and showed Defendant McKelvy pictures of the poor grade of lumber and pictures of the incorrect excavations.

Plaintiff informed Defendant McKelvy that the Macris were bonded by Continental Casualty Company with both performance and payment bonds. Plaintiff further informed Defendant McKelvy of the following: that the Macris had signed the general contract with the Bureau of Reclamation on job specification #1062 on 12-7-1943, that on or about 3-2-1944 Plaintiff received a letter from Macris' job superintendent, George Staples, asking Plaintiff for a bid on the concrete work for this job specification #1062, that the Plaintiff herein signed a subcontract with the Macris in connection with this job specification #1062 pursuant to the terms of which Plaintiff was to build forms, place reinforcing steel, pour and finish certain concrete work on the Roza

Irrigation Project near Yakima, Washington, Plaintiff posted bonds as required, and within the times stipulated entered into performance of said sub-contract and with diligence pursued said work in conformity with the terms of the contract and the plans and specifications. That the Plaintiff herein signed a second sub-contract with the Macris for similar work, said work being a Roza Project extension of the work sub-contracted on 3-14-1944, and this contract was on job specification #1068. That Plaintiff was not required to post bond on this job. That the Macris had Plaintiff sign said sub-contract on this job on 4-21-1944 and Macris at that time did not have a contract with the Bureau of Reclamation, but signed a contract with the Bureau of Reclamation on or about 5-18-1944. That the contract between the Macris and the Bureau of Reclamation called for work to commence within 30 days of the signing of said contract, but that the Macris had not yet started any excavating for structures, and that had the Macris asked Plaintiff to sign the sub-contract on this job specification #1068 in the customary sequence which would then have been on or after 5-18-1944 Marcis would have failed to have Plaintiff enter into said sub-contract, as this was after the argument in the field on 4-29-1944. Plaintiff also informed McKelvy that all except two of Plaintiff's men were withdrawn from this job specification #1062 on 5-22-1944 because of lack of lumber and excavations. That Plaintiff left these two men on the job so that the Macris could not charge Plaintiff with having abandoned the job and that

Plaintiff returned additional men to the job on 6-29-1944 and that the first day Plaintiff was able to start pouring concrete was 7-31-1944.

That in the first part of May, 1944, Mr. Davis, a superintendent for Sather Construction Company, who was also doing some construction work on the Roza Project, had advised Plaintiff and his brother Wm. E. Schaefer that we should watch our P's and Q's as we were sub-contracted to a ruthless outfit if there ever was one. Mr. Davis said, "I'll bet you are bonded to the Macris." Plaintiff said, "What makes you think so?" Mr. Davis said, "I just know so. That is the way they operate. They will break you and then go in with their own crew and do the work that you contracted to do and charge the cost of that part of the work and add in a lot of the cost of the work that they themselves were to do on their own part of the work and send the bill to your bonding company. Your bonding company will then pay them and turn around and wipe you fellows out of business."

That about July 15, 1944, a friend of Plaintiff's, Mr. John E. Walker, then of Spokane, Washington, came to Portland to inform Plaintiff that he had heard that Macri Company was attempting to break Concrete Construction Co. out on the Roza job near Yakima, Washington, that he had been informed by a man that said he was a foreman for a construction company doing work on the Roza Project. Plaintiff at this time gave Defendant McKelvy copies of sub-contracts and specifications on job specifications #1062 and #1068, and letter of Sep-

tember 18, 1944, which is a copy of a letter from the Bureau of Reclamation office at Yakima addressed to Macri Company with copies to Continental Casualty Company and Concrete Construction Company. Copy of said letter follows to wit:

"Reference is made to paragraph 23 of Specifications No. 1062 and to paragraph 21 of Specifications No. 1068, for which you hold the performance contracts.

"Under the provisions of the above-mentioned paragraphs, we wish to call your attention to the fact that the work under these specifications is not being prosecuted with sufficient equipment and forces to insure completion by the completion date of both contracts.

"In the absence of specific information to the contrary, it is assumed that the sub-contractors now engaged on Specifications No. 1062 will also perform similar work on Specifications No. 1068. If this is the case, the Concrete Construction Company will need to construct 500 structures on Specifications No. 1062 and 786 on Specifications No. 1068, or a total of 1,286 structures. Our records indicate that this company completed 87 structures last month and only 36 structures to the 13th of this month, for a total of 123 structures.

"Considering both contracts together, and from this date forward, at least 185 structures will need to be completed per month with no time allowance for winter weather conditions, if the work is to be completed within the contract completion dates.

Obviously the rate of placement of concrete structures will need to be greatly increased to meet such a schedule and you are requested to immediately take the necessary steps to bring both jobs up to schedule. Frankly, your facilities now on the job to date are not sufficient to complete Specifications No. 1062 and we cannot understand how you expect to perform the work on Specifications No. 1068 without increasing the present facilities or bringing in an independent organization to complete Specifications No. 1068

"We wish to also call to your attention that, of the 90,000 l.f. of concrete pipe of all sizes to be laid on both schedules, only a little better than 9,000 l.f. have been laid to date. The 9,000 l.f. now in place have been laid by a succession of sub-contractors of whom the last was definitely not a qualified pipe layer. You are requested to immediately resume pipe laying operations with a sufficient force of qualified pipelayers so as to insure completion of this work during favorable weather conditions.

"We cannot accept labor conditions as a prime cause of these delays for the reason that all of our other contracts now in force are ahead of schedule. We have been advised that a considerable part of these delays are due to protracted negotiations with prospective sub-contractors rather than to an aggressive prosecution of the work.

"Very truly yours,

"H. T. NELSON,
"Construction Engineer."

Defendant McKelvy told Plaintiff he did not think it would be necessary to bring suit since Macris' attorney, Mr. Holman, had been in their office for a number of years and that although Mr. Holman was not associated with another office, they were still cooperating as if he were still with their office; that they were just like that (indicating by putting his second finger over the index finger), and that if things did not work out right that way we would then go ahead with a suit. Defendant McKelvy then had Mr. E. L. Skeel the senior partner of the law firm come into his office and related some of the things Plaintiff had told McKelvy. Mr. Skeel said that he couldn't see how we could hold the Casualty Company and we could probably only hold the Macri Company if we have absolutely segregated costs as "this is in the contract" and "that is outside of the contract." Plaintiff then said, "That is impossible in a situation like this. None of the excavations were made to specification. They were all excavated tight so one can not segregate the time required to set and strip forms in these excavations from the time it would require to set and strip forms in excavations dug to specifications, or make that kind of segregation on any other part of the work." Plaintiff also delivered to Defendant McKelvy the memoranda of meetings on 4-29-1944 and 6-15-1944, items (7) and (10), of which the following are substantial copies:

We, Wm. E. Schaefer and M. C. Schaefer, had an appointment with Sam Macri for 10:00 a.m.,

4-28-44, at the job office. Macri did not show up. George Staples, Superintendent for Macri & Company, came in from the field in the afternoon. M. C. Schaefer asked him to locate Macri. Staples called Seattle but did not reach Macri and the Seattle office did not know where he was. Staples then said, "I believe Macri is going to quit interfering with my program, forcing me to lay off men, saying you've got too many men, the pay roll is too big, lay them off, and if he doesn't, I don't think I'll be here long, and I'm going to put on sufficient help and see that the excavating will be done according to specification."

M. C. Schaefer said, "That's not enough. You get hold of Macri and see that he shows up tomorrow before noon or we'll start gathering our equipment and pull off the job starting at noon."

Staples said, "Don't do that, Matt. In the future I'll see that you don't have to wait for anything. I'll get in touch with him." He then called Yakima and talked to Macri.

The next day Macri, W. E. Schaefer and M. C. Schaefer met at the office and drove to the field. We stopped at Structure #18. Fred Waltie (our superintendent) and George Shular, a form setter, were excavating. M. C. Schaefer had them stop excavating. Waltie then sent Shular to the yard to work. Waltie then came with us to check the excavations. We checked approximately 6 or 7 holes and they were all off.

Macri said, "Well, we are just getting started.

You've got to expect some of this at the start, and you are supposed to do some grading .2 or .3."

M. C. Schaefer said, "Oh no, we don't have a thing to do with it, but you are trying to shove it onto us, and that's what we're here about."

Macri said, "All right, we'll get the excavating right from now on." Turning to Staples he said, "You get the men in here and get this grading done." Then looking at M. C. Schaefer said, "Or you go ahead with it and I'll pay you for it."

M. C. Schaefer said, "Now just a minute. You know better than that. You get your men in here and see that these holes are excavated per plan and specifications, and that means out 1 foot and on a 1:1 slope, and have sufficient men and equipment here to do it. You told us you would have plenty of equipment and men on the job so that we could go as fast as we wanted to, and here we are killing time laying out for fine grades, excavating, grading, cribbing, backfilling, rebuilding dried-out forms, etc., and not only that but: What are we going to do next week? You get down to business and excavate these holes to the specifications."

Macri said, "You take the excavating item, then you handle it."

M. C. Schaefer said, "No, but if we were doing it, we'd watch our cut banks and elevations and not only excavate out a foot and on the 1:1 slope, but would pull out a couple extra shovelfuls here and there so the finegraders in trimming the cut banks and fine grading could semi-shove the excavating

material into these extra pockets instead of shoveling up on a bank and having the carpenters kick it back into the hole. I'll say the total excavating cost for structures would be less if the excavating were done per specifications than the hand work alone is costing now."

Macri said, "We haven't got the men. This little grading don't amount to anything. Keep track of it, and I'll pay you for it."

M. C. Schaefer said, "That's not all you are going to pay for. You're going to pay for all the extras. What do you think we are? Who do you think is going to pay the extra cost of placing these forms, of stripping them out of such holes as this, wrecking them, and having to haul all the forms back to the yard for repair instead of to structures ahead. We're going no further. If your performance doesn't change, we'll just pull out."

Macri said, "All right, quit arguing. We'll get more men in here, and I'll get another shovel on the job, and we'll get excavations right, and we'll keep out of your way. I'll pay you all extras then, so keep going." He then turned to Staples and said, "Get men in here and get this work fixed up." Staples then left to lay out holes for the shovel.

Back at the office later, M. C. Schaefer said to Staples. "Now what will these promises amount to."

Then Staples said, "Now that's it. Macri passes it onto me. Out in the field he said, 'We will get things on the button,' then he told me later, 'Keep going as you are. Let them excavate .2 or .3,' and

Matt, I'm getting tired of it. I knew yesterday where to reach him, but he said to me not to call him unless I had to. Well, when you said you were going to pull out, I had to get in touch with him. I don't know what to think. Macri is paying my salary, but this buck passing isn't a part of our deal. On the other hand, stick with it. I'll get more men on and get things working as they should or Macri will have to lay me off. I'll not quit. I'll work it out, or he'll have to lay me off."

We, Allyn R. Hunter, Fred Waltie, and M. C. Schaefer, had an appointment with Sam Macri 6-15-1944 at the job office.

We then drove to the field to check the excavations, the conditions of the set forms, etc. Present were Sam Marci, Mr. Cohn, Macris' Engineer; Allyn R. Hunter, Rogers Insurance Agency, Fred Waltie, our Superintendent, and M. C. Schaefer.

M. C. Schaefer pointed out the different errors in the excavating work, the condition of the set forms, etc.

Macri said, "That's nothing to holler about. We just got started here. The rest are better, and we'll get them o.k. from now on."

M. C. Schaefer said, "You point out any that are better." So we went on to check more holes, none were better, but some were worse. M. C. Schaefer pointed out where we had set the outside forms so that Macri's crew would know where to crib and backfill and where they had so backfilled.

M. C. Schaefer said, "This is backfilled, and the

backfill is not puddled, who is to take the responsibility of cracked structures due to such backfilling?"

To which Macri replied, "That's not for you to say. That's up to the inspector."

M. C. Schaefer said, "Yes, but I sure expect to hear about it if the structure cracks. That's a minor detail. The real thing is, when are you going to get these excavations to specification, and I mean excavated out 1 foot and on the 1:1 slope. The way these holes are excavated the slow progress and absolute lack of cooperation on the part of Sam Macri & Company is making our work cost, if continued in the same way, in excess of twice our bid price. Now just when are you going to get men in here and get going? We are tied up now without anything to do on account of there being no holes ready and no material, and we are paying a couple of men so as not to lose them."

Macri said, "Well, you take the excavating item."

M. C. Schaefer said, "No, but as I told you before, if we were doing it, we would watch our cut banks and elevations and excavate per specification, which is out 1 foot and on a 1:1 slope. Plus that, we'd excavate a bit more, if anything, so as to give room for the hand excavators to semi-shove the small amount of hand excavated material then required to be excavated to a side instead of shoveling up on a bank for the carpenters to kick back into the hole again and for the strippers to dig out before they will be able to get the forms out. And

I'll say it again, I believe the total excavating then would cost less than the hand excavating alone is costing now."

Macri said, "You are supposed to do a little grading .2 or .3.

M. C. Schaefer said, "Here we go again, the same old argument, the same old promises over and over again. We don't have a thing to do with it! You bettter get all that equipment you've been promising for so long in here and the necessary men I've asked that you have clear sailing ahead for us so we can pour at least 20 cubic yards of concreate per day, and I mean every day, and that means at least 80 structure excavations ahead of our pouring crew."

Macri said, "All right, we'll get the excavating right from now on. We'll have an engineer on the job Monday, and we'll get necessary material on the job. So get back and go to work."

M. C. Schaefer said, "Not yet we won't. You get plenty of holes ahead first. Your Superintendent in his letter to us before we figured the job said you would be ready for concrete in about two weeks, and here we are tied up like this."

Macri said, "Yes, you told me Staples was a good man, and he can't handle it."

M. C. Schaefer said, "I've never said anything of the kind, but if he had had a little cooperation from you, he probably would have done better by far."

Macri said, "I'll have an engineer on the job Monday, so quit arguing. We'll get going."

M. C. Schaefer said, "When will you get these holes cleaned up and reexcavated per specification?

If not soon, you will be doing the forming and concrete work yourself. This expensive operating is at an end right now. You're going to have a big extra bill so far."

Macri said, "I told you I will pay for the extra excavating."

M. C. Schaefer said, "Extra excavating—you're paying for all the extras."

Macri said, "All right. I'll pay all extras. Nobody will lose money on my job. I told you that before, so go to work. I'll have an engineer on the job Monday."

M. C. Schaefer said, "All right. You said you will pay all extras, that you'll have an engineer on the job Monday, and that you will have plenty of material and we won't be stymied again."

Mr. Macri and Hunter walked on ahead and did some talking in a low voice that I did not hear and I doubt that Cohn heard what they were saying.

Mr. Cohn, Fred Waltie, and I were walking approximately 15 to 20 feet behind Macri and Hunter and Mr. Cohn said, "This is no way to do the excavating. It should be excavated per specifications. Macri told me that he wants me to take charge of this job, and if I do, I'll see that things get straightened out and running smoothly. But you can't tell. By the time we get back to Seattle, Macri will probably decide to put someone else in charge."

Mr. Skeel then went back to his office and Mr. McKelvy said: "I will have to study this thing over a bit; however, I think that we can come to a satis-

factory agreement through Holman shortly, or we can then file suit. I'll get in touch with Holman and I should have something for you on this in the next few days.

The following is a photostatic copy of an office memo from Mr. McKelvy to Mr. Kelly of their office. This memo was inadvertently handed Plaintiff together with the return of Plaintiff's papers on October 20, 1945. (The above memo consists of four photostatic pages.)

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November 8, 1944.

Mr. Kelley:

Re: Concrete Construction Co. -
M. C. Schaefer, Subcontractor,
Roza Project, Yakima.- Macri & Co., Contractors.

not here just schedules & specifications

Attached are Subcontracts and Contracts Nos. 1 and 2. Mr. Schaefer subcontracted the concrete work on the Roza Division, Yakima Project. No work has as yet been started on Contract No. 2. Contract No. 1 is about one-third completed. The contract terminates on February 8, 1945.

The nature of work being performed is pouring the concrete in building diversion channels and other structures in connection with this Reclamation Project. Macri & Company, general contractors, does the work ahead of the concrete work, so that the speed of the sub-contractor is governed by the general contractor.

Schaefer, representing Concrete Construction Company, claims that it is impossible for him to continue with the work; that he has already lost a lot of money; that it will be impossible to complete the work by February 8, due to the fact that the concrete work cannot be done in cold weather, and claims that the reason he has lost money on the job is that Macri & Company has breached its agreement in the following respects:

1. The excavating is being done in a haphazard manner and not according to specifications, making it necessary for Schaefer to excavate before doing his part of the work, at considerable expense; perhaps this would constitute performance being prevented by acts of adverse party 17 C.J.S. p. 910

2. Macri furnishes very poor lumber,-apparently lumber used on other contracting jobs;

3. Macri has failed to put enough equipment on the job to keep excavation ahead of Schaefer, with an ordinary crew; see above-same reason

4. Schaefer has not been paid until very late; has atill not received his pay for September. (See Article 2 of Sub-contract in this connection.); Good Grounds -

5. Macri has failed to construct roads so that Schaefer can get equipment around. Schaefer is bonded on Contract No. 1 but is not bonded on Contract 2, which has not yet been commenced. Macri is probably bonded to principal contractor - notice should be sent owner ?

The evidence which Schaefer has concerning Macri's acts is not specific and satisfactory; nevertheless Schaefer insists that he must collect or go broke. He has had a number of meetings with Macri and the Project Engineer, but nothing has been accomplished. 66

Cancel & ask quantum meruit recovery ? (and loss sustained by others by breach)

In effect, Schaefer now wants to know how he can thr up these contracts and best protect himself?

Probably Schaefer should notify Macri & Company that he is not going to proceed with the work, outlining various reasons. Also, we should consider the advisability of bringing suit on Contract No. 1 for past and future damages.

Mr. Skeel should call Mat Schaefer, Portland (Lander 4181) and give him our tentative ideas at least on what we think he should do.

McK.

D.

waiver of breach?

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Re arbitration Rule
Marvin et al safe Co vs Purcell Safe Co
see case
81 W 592

106 W 254 Bishop v Ryan Construction Co.
Refusal to make a monthly payment due for hauling on county road work as to determine the amount due, constitutes breach of the contract, warranting a cancellation.

Failure to immediately cancel a contract upon non-payment was not waiver of the right - party could so cancel at any time up to time other party offered to make such payment.

130 W 348 Francis v Hoard
Party guilty of first breach of contract may be deprived of benefits therefrom, such as profits

71 Pac (2) 30 (Wash) Russell v Stephens
our Supreme Ct differentiates between "rescission" and "termination by breach"
"Breach" allows action for damages against defaulting party. 5 Page on Contracts # 2878, 3023, #3024, #3027
also 3 Williston #1301-1303, pp 2351-55

1. Call attention to breach

2.

By reason of these [illegible] we [illegible] [illegible] entitled to terminate & refuse to [illegible] & [illegible] [illegible] & profits

3. full of [illegible] &

4. tender for arbitration — which we entitled to & after [illegible] & [illegible] of [illegible] they have been in default

illusory

(17) 11-30-1944: Received letter from the said Macris notifying Plaintiff to proceed on job specification #1068. On this date there had not yet been any preparatory work done by Macris and it was not possible for Plaintiff's crew to do any work on this job.

(18) 1-3-1945: Macri letter to Plaintiff charging Plaintiff with default on job specification #1068 and that they (the Macris) were going to proceed with the work and charge the cost of said work to Plaintiff's account.

On this date there had not yet been any preparatory work done by the Macris and it was not possible for Plaintiff's crew to do any work on this job. All the defendants herein knew these facts.

(19) 1-23-1945: Mr. McKelvy and Plaintiff met with Sam Macri and his attorney, Mr. Tom Holman, at Mr. Holman's office in Seattle. In discussion on payment for excavation, Plaintiff asked Mr. Holman: "What would you say if, as I contend, the payment is for excavation as the specifications read and not for actual excavation as being done by the Macris?" Mr. Holman answered: "I would say then that you have a good legitimate claim against the Macri Company." Mr. McKelvy heard this, and on or about 1-27-1945 received a copy of a letter from the Bureau of Reclamation office at Yakima confirming that the Macris were receiving payment for excavating at one foot out at base of structure and on 1:1 slope as specified and as Plaintiff contended. All the Defendants herein knew these facts.

(20) 1-27-1945: Macri letter to Plaintiff regarding overtime penalty. Copy of letter follows:

January 27, 1945

Concrete Construction Co.

Re: Subcontract No. 1062, Roza Division, Washington; U. S. Reclamation Job Specification No. 1062

Gentlemen:

This is to advise you that under the terms of our principal contract all work is to be performed and completed within four hundred days after December 29, 1943. You are therefore advised that any failure to complete your subcontracted work will result in a charge to you of any penalty for delay that may be asserted against us by the United States on account thereof.

A copy of this communication has been mailed to your surety, Glen Falls Indemnity Company, care of Mr. R. F. Owen, Spalding Building, Portland, Oregon.

Very truly yours,

MACRI & COMPANY,
By SAM MACRI.

SM/WW

Registered—Return rec. requested.

(21) 2-9-1945: Defendant McKelvy, Mr. Kelly, an attorney in McKelvy's office; Mr. Hewitt, a civil engineer from Yakima; P. L. Darcy, Plaintiff's superintendent on job specification #1062, and Plaintiff inspected excavations, forms, and lumber on both jobs, specifications #1062 and #1068, and took some pictures of same.

(21-A) 2-13-1945: Date of purported letter from McKelvy to Macri Company. Macris claimed not to have received this letter, and Mr. Kelly of Mr. McKelvy's office said that it was not sent. Copy of letter follows:

February 13, 1945.

Macri Construction Company,
905 10th Ave. So.,
Seattle 4, Washington.

Attention: Mr. Sam Macri

Dear Mr. Macri:

Mr. Matt Schaefer of the Concrete Construction Company has furnished me with an itemized breakdown of his costs already incurred in connection with Contract No. 12r-14825, Specification No. 1062, United States Reclamation Job, Roza Division, Yakima Project, Washington, which cost figures I am herewith transmitting to you. You will note that these are itemized by the month, each page representing a separate month, from March, 1944, to January, 1945, inclusive, together with a recap sheet.

Mr. Schaefer also advised me the other day that he had not yet received a check for his December

work from you. Possibly this has already been forwarded to him by this time.

With reference to your letter of January 27, 1945, addressed to the Concrete Construction Company on the above matter, wherein you advise the Concrete Construction Company that you will charge any penalty assessed by the United States against you to such company, please be informed that our investigation discloses that you have not completed your own work as required under your contract with the United States Bureau of Reclamation in regard to the above project. This work of yours which has not been completed as of this date by you has prevented and is preventing the Concrete Construction Company from finishing up its subcontracting work. Under these circumstances the Concrete Construction Company will therefore refuse to accept your attempt to charge a penalty to that company, which penalty, if any be assessed, would be due to your own failure to comply with the original contract and the subcontract.

In connection with the second subcontract No. 1068, Roza Division, Washington, United States Reclamation Job Specification No. 1068, to which you refer in your letter of January 3, 1945, it appears that you have likewise failed to comply with the provisions of said subcontract.

An investigation of the excavations made by you with reference to such second subcontract, such investigation being made on February 10, 1945, discloses that all of such excavations have been made in a manner contrary to the specifications of such

contract and subcontract. Such specifications provide substantially that an allowance of one foot outside of the outside wall is to be made entirely around the structure, including head walls, and back slopes of 1:1 are to be allowed all the way around from one foot outside of the structure to the ground surface.

This has not been done in any of the excavation work in connection with such subcontract No. 1068 and the excavation has been made sheer on virtually every wall, with little or no allowance, making it impossible to construct forms therein and to do the necessary work preparatory to pouring concrete. This is the same type of defective work that you did in connection with all of the excavation on Contract No. 1062 and the subcontract in connection therewith, which made it impossible for the Concrete Construction Company to proceed with Contract No. 1068 and the subcontract therewith.

At this time, therefore, by reason of such faulty excavation in connection with your work on Contract No. 1068 and the sub-contract therewith, Concrete Construction Company hereby declares that you have breached the provisions of said subcontract No. 1068 and said Concrete Construction Company therefore holds you in default and declares the forfeiture of such subcontract by reason of your breach thereof.

Yours very truly,

W. R. McKELVY.

WRM:MW
Encl.

(22) 4-8-1945: Date Plaintiff finally completed job specification #1062.

(23) Last part of July, 1945: McKelvy showed Plaintiff a clipping from a Seattle newspaper telling of Stephen Macri's thefts from Macri Company by forging checks. McKelvy told Plaintiff: "Everyone knows the kid didn't do it. It is only a coverup of Macris' assets, but he has had his day in court and that's a closed book."

(24) About the 15th of October, 1945: As Mr. McKelvy and Plaintiff were walking up the street in Seattle, Mr. McKelvy told Plaintiff that Plaintiff could not collect from Macris as the Macris had all their assets hidden, that the chances of holding Continental Casualty Company were very slim, and told Plaintiff to turn his business and anything of value over to his brother Bill, a brother-in-law or someone Plaintiff could trust and thereby get rid of the account with Uncle Sam and all other old accounts, and also how he (McKelvy) handled an account for a local contractor and the bank in that case lost approximately $83,000.00, but he (McKelvy) got their release on it and that the contractor is still doing business. Plaintiff told McKelvy: "My road is a straight road, probably long and rough as hell, but that's the only road I'm traveling, and if it busts me up that is still the way it's going to be done." Plaintiff then asked McKelvy how Mr. Kelly was coming along with the preparation for filing of suit. McKelvy said: "I

think he has got it pretty well ready now. I have been awful busy the last few days but will check with him, I think perhaps it would be well for us to get together sometime within the next week and go over all details together. Meantime, I will check up to see that we have all the details we need and I'll let you know in time for you to look up and bring any needed information up with you."

(25) About October 18th, 1945: Plaintiff had an appointment with McKelvy for 11:30 a.m. at McKelvy's office. (Plaintiff's intention for this meeting was to have a showdown with McKelvy and see what, if anything, was actually being accomplished by McKelvy's office in preparation for the filing of suit, because McKelvy had suggested that Plaintiff make fraudulent conveyance of his assets for which if Plaintiff had followed such advice could have and should have been jailed and the key should have been thrown away.)

Plaintiff met McKelvy, only greeted him, and had a few words but did not get into the subject, when McKelvy told Plaintiff that he had a luncheon speaking engagement and would meet Plaintiff back at McKelvy's office at 1:15 p.m., McKelvy and Plaintiff each went to lunch. Plaintiff was back at McKelvy's office a little before 1:00 p.m. The outer office girl asked if Plaintiff were waiting for Mr. McKelvy. Plaintiff said: "Yes." The office girl said: "Mr. McKelvy isn't going to be in any more today." Plaintiff said, "Yes, he is to be back at 1:15. That was our arrangement just before lunch. I will wait." Then at approximately 1:20

the girl said: "I really don't think he will be back, as he is going to his new home." Plaintiff asked what the telephone number was; the girl said, "I don't know, he has no telephone out there yet." Plaintiff asked what the address was; the girl said, "I don't know." Plaintiff then asked if there was not someone in the office that did; the girl said: "I am sure there isn't." Plaintiff waited until 3:30, then left for Portland.

(26) 10-20-1945: On or about this date Plaintiff herein went to Defendant McKelvy's office in Seattle without previous appointment, because of the fact that Plaintiff had been left sitting the day of the previous appointment with Mr. McKelvy.

Plaintiff at this meeting insisted that Defendant McKelvy state definitely the date that suit would be filed against the Continental Casualty Company and the Macris, and also asked Defendant McKelvy how long Plaintiff yet had in which to bring suit. Defendant McKelvy then for the first time informed Plaintiff that he could not represent Plaintiff in any action against the Defendants Macris and the Continental Casualty Company because Macri Company was a good customer of Continental Casualty Company, who was one of Defendant McKelvy's largest accounts, and that they handled nearly all of Continental Casualty Company's legal work in Washington, and that that which they did not handle directly, they turned over to other attorneys to handle. Then, he told Plaintiff that Plaintiff yet had about a month left within which to file

suit. Plaintiff then asked McKelvy for the name of an attorney in Yakima (this was for the purpose of checking closely and perhaps making sure that he did not hire the attorney suggested by Defendant McKelvy). Mr. McKelvy then named four attorneys in Yakima.

That all the aforesaid acts by Defendants McKelvy were in furtherance of the original conspiracy of Defendants Macri and Philp and Goerig, and Continental Casualty Company through said Defendant Philp and through its attorneys, Messrs. Skeel and McKelvy.

(27) 10-22-1945: On or about this date Plaintiff employed Harry L. Olson of Yakima, Washington, as attorney to do the same things which Defendant McKelvy previously had agreed to do, namely, file a lawsuit against the Macris and the Continental Casualty Company on Job specifications #1062 and #1068 and to do all things necessary to protect Plaintiff in all his rights.

Plaintiff fully informed Olson of all things herebefore in this complaint set forth, including all the details of the wrongs done to Plaintiff by Defendant McKelvy. Mr. Olson told Plaintiff: "Let's take one thing at a time. Let's get this Macri deal out of the way first, then we can take up the other matters. We still have plenty of time to get to that." Olson thereupon promptly investigated the facts of the complaint against Macris and on or about the first day of December, 1945, made a written demand upon Defendants Macris for the payment of sums due Plaintiff for the performance of said work and

gave the said Defendants Macris until the 15th day of December, 1945, within which to meet said demand, said notice specifying that in the event of said Defendants' failure to do so, suit would promptly be instituted for collection of the same.

(28) 12-14-1945: On this date the Defendants Macris, Continental Casualty Company (through its agents Philp & McKelvy and Defendants Philp & McKelvy, personally), in furtherance of their malicious concerted conspiracy, filed a malicious suit in the Circuit Court of the State of Oregon for the County of Multnomah, alleging damages suffered by themselves in the amount of $40,000.00 by virtue of Plaintiff's alleged breach of said second sub-contract for performance of work on job specification #1068. This suit in Multnomah County, Oregon, was malicious, wilful, without probable cause, and was filed for the sole purpose of bankrupting Plaintiff so he could not file and prosecute his threatened suits in Yakima, Washington, and in fact had the effect of drying up Plaintiff's credit, causing him severe damage to his business in Portland, and reducing him to such an impecunious financial condition as to make virtually impossible the filing and prosecution of the threatened suit in Yakima. Plaintiff was in such financial straits that he could not buy any materials without sending a check with the order, and in order to get concrete materials or ready-mix concrete; was forced to buy same through one of his employees who had a maximum credit of $500.00 and on some occasions when the collections fell short

this employee would borrow the money from a friend for a few days until Plaintiff could make said payment to him.

Plaintiff was constantly being harrassed by his creditors, and within four weeks after the filing of this suit in Oregon Plaintiff had lost fifteen pounds. Copy of said Summons and Complaint follows:

(Summons typed on blank No. 190)

In the Circuit Court of the State of Oregon for the County of Multnomah

166476

SAM MACRI, JOE MACRI and DON MACRI, a Co-Partnership, Doing Business Under the Assumed Name and Style of MACRI COMPANY,

Plaintiffs,

vs.

M. C. SCHAEFER, a Sole Trader, Doing Business Under the Assumed Name and Style of CONCRETE CONSTRUCTION COMPANY,

Defendant.

SUMMONS

To: M. C. Schaefer, a sole trader doing business under the assumed name and style of Concrete Construction Company, Defendant

In the Name of the State of Oregon:

You are hereby required to appear and answer the complaint filed against you in the above-entitled

action within ten days from the date of service of this Summons upon you, if served within this County; or if served within any other County of this State, then within twenty days from the date of the service of this Summons upon you; and if you fail so to answer, for want thereof, the Plaintiffs will take judgment against you in the amount of $40,000.00, together with interest thereon at the rate of 6% per annum from January 3, 1945, and their costs and disbursements incurred herein.

MAGUIRE, SHIELDS &
MORRISON,
JAMES G. SMITH,
Attorneys for Plaintiffs,
800 Pittock Block,
Portland, Oregon.

State of Oregon,
County of Multnomah—ss.

I, James G. Smith, one of the Plaintiffs' Attorneys, do hereby certify that I have prepared the foregoing copy of Summons and have carefully compared the same with the original thereof; and that it is a correct transcript therefrom and of the whole thereof.

Portland, Oregon, dated the 14th day of December, 1945.

/s/ JAMES G. SMITH,
Attorney for Plaintiff.

In the Circuit Court of This State of Oregon for the County of Multnomah

No. 166476

SAM MACRI, JOE MACRI and DON MACRI, a Co-Partnership, Doing Business Under the Assumed Name and Style of MACRI & COMPANY,

Plaintiffs,

vs.

M. C. SCHAEFER, a Sole Trader, Doing Business Under the Assumed Name and Style of CONCRETE CONSTRUCTION COMPANY,

Defendant.

COMPLAINT

Come now the plaintiffs and for cause of action against the defendant, complain and allege as follows:

I.

That during all times hereinafter mentioned, the Plaintiffs Sam Macri, Joe Macri and Don Macri have been and now are co-partners doing business under the assumed name and style of Macri & Company with principal place of business at Seattle, King County, Washington, and with all said partners being residents of said City, County and State.

II.

That during all times hereinafter mentioned the defendant, M. C. Schaefer, was a sole trader doing

business under the assumed name and style of Concrete Construction Company, with his principal place of business and residence in Portland, Multnomah County, Oregon.

III.

That heretofore and on or about the 18th day of May, 1944, the Plaintiffs entered into a written contract with the United States of America acting by and through its Department of the Interior, Bureau of Reclamation, said contract being contract No. 12r-14996, specifications numbered 1068, for the performance of earthwork, pipe lines and structural laterals and sub-laterals, Roza Division, Yakima project, Washington, according to the terms and specifications in said contract contained and provided, and particularly in accordance with said Specification No. 1068.

IV.

That the said contract above referred to provided that the Plaintiffs might enter into sub-contracts in carrying out the provisions of said contract No. 12r-14996, and on or about the 21st day of April, 1944, the Plaintiffs entered into a written sub-contract with the Defendant, M. C. Schaefer, dealing as a sole trader under the assumed name and style of Concrete Construction Company, by the terms of which said sub-contract the said Defendant agreed to furnish all labor, and necessary equipment to do all the concrete work, form work, cut, bend and install all reinforcing steel; and to strip and clean all

concrete forms, remove nails from same and pile same in neat piles, all in accordance with the plans and specifications as set forth in said Specification No. 1068, Roza Division, Yakima Project, Washington; that a true, full and complete copy of said sub-contract entered into by said Plaintiffs and the said Defendant, M. C. Schaefer, is hereto attached, marked Exhibit "A," and by reference made a part of this complaint.

V.

That said sub-contract entered into by and between the Plaintiffs and the Defendant as aforesaid, provided that:

"Time being the essence of this Contract the Subcontractor shall prosecute his work with a diligence and to the utmost of his ability and in a workmanlike manner."

Said contract further provides:

"Commence the work when directed by the Principal Contractor and thereafter prosecute it continuously and diligently to completion.

"Coordinate the work covered by this agreement with that of all other sub-contractors and of the Owner and of the Principal Contractor. Use all reasonable means to avoid delay either in the work hereunder or in the work of others and cooperate with the Owner, the Principal Contractor and all other sub-contractors to facilitate the completion of

the entire work. The sub-contractor shall be governed by such orders as the Principal Contractor may give as to the time and sequence in which the component parts of the work shall be done. The sub-contractor shall not be entitled to any damages or additional compensation arising from, or because of any reasonable orders given or acts done by the Principal Contractor for the purpose of coordinating the work of all contractors, sub-contractors and material men. If the subcontractors shall be delayed in the performance of the work as a result of such orders or acts, the Subcontractor shall be entitled to an extension of time equal to the delay so caused; provided, however, that written notice of the fact and cause of such delay be given by the subcontractor to the Principal Contractor within five days after the occurrence of the cause of such delay and said extension of time shall be thereafter determined and allowed and specified in writing by the Principal Contractor. The Subcontractor shall assume full responsibility for and indemnify the Owner and the Principal Contractor against all loss, cost and expense which may result from Subcontractor's delaying the progress or completion of the entire work.

VI.

That thereafter, on or about the 30th day of November, 1944, the Plaintiffs directed the Defendant to commence performance of the work called for under said sub-contract, such order having been given by letter, a full, true and correct copy of

which is hereunto attached, marked Exhibit "B" and by this reference made a part of this complaint.

VII.

That the Defendant failed, neglected and refused to commence performance of said work provided for by said sub-contract when directed to do so by the Plaintiffs and failed to coordinate the work covered by said sub-contract with the work of the other sub-contractors and with the work of the Plaintiffs as principal contractor as required by the terms and provisions of said sub-contract, and continued to fail, neglect and refuse to perform said work or any part thereof.

VIII.

That on the continuing failure of the Defendant, M. C. Schaefer, to carry on the performance of his said sub-contract and to coordinate the work provided for thereunder with the work of the other sub-contractors and of the principal contractor, the Plaintiffs, on the third day of January, 1945, notified the Defendant in writing that he was in default and that the Plaintiffs would take over and perform at Defendant's cost the work described in the said sub-contract; a full, true and complete copy of said notice marked Exhibit "C" is attached hereto and by this reference made a part hereof.

IX.

X.

That thereafter the Plaintiffs herein did take over and now have fully performed the work provided by the sub-contract between the Plaintiffs and the Defendant; and likewise the Plaintiffs have now fully and completely performed the principal contract No. 12r-14996.

XI.

That the Plaintiffs have fully kept and performed all the terms and conditions of their said sub-contract with the defendant on their part to be kept and performed.

XII.

That by reason of the failure of the Defendant to perform the work agreed to and provided for by the terms and conditions of said sub-contract and by reason of his failure to coordinate the work covered by said sub-contract with the work of the other sub-contractors and with the work of Plaintiff as principal contractor; and by reason of his default under said sub-contract and his breach thereof, the Plaintiffs herein suffered damages in the amount of $40,000.00.

XIII.

That there is owing by the Plaintiffs to the Defendant an amount not in excess of $1,499.87 by reason of defendant's performance of a sub-contract entered into by and between the Plaintiffs and the Defendant in connection with the performance by the Plaintiffs as principal contractor of certain

work under Contract No. 12r-14625, Specifications No. 1062, Roza Division, Yakima project, Washington; and Plaintiffs are now willing that all amounts which Defendant is entitled under said sub-contract may be deducted from any amount to which Plaintiffs may be entitled under the allegations of Plaintiff's complaint herein.

Wherefore, Plaintiffs pray for judgment against the Defendant M. C. Schaefer for the sum of $40,-000.00, together with interest thereon at the rate of 6% per annum from the 3rd day of January, 1945, and for their costs and disbursements herein.

TOM W. HOLMAN,
MAGUIRE, SHIELDS &
MORRISON,
Attorneys for Plaintiffs.

(29) 12-20-1945: Despite the filing of said malicious suit in Multnomah County, Oregon, Plaintiff was able to and did file his suit in the Federal District Court in Yakima, Washington, on or about the 20th day of December, 1945. This suit was filed under the Miller Act and was in Quantum Meruit after checking the information contained in a letter received from the Bureau of Reclamation office setting forth the procedure to be followed in connection with claims against contractors holding bonded government contracts. The following is information contained in said letter from the Bureau of Reclamation dated August 10, 1945, to wit:

"This will supply the information requested in

your call to this office on August 8 concerning the procedure to be followed in connection with claims against contractors holding bonded government contracts.

"Accounts for services or materials that are definitely related to this contract are fully protected by a payment bond which the Government contractors are required to execute. The Government does not participate directly in the settlement of such accounts, but the provision of the bond become available in the event that a suit becomes necessary.

"'The procedure in cases of this kind is as follows:

> " 'Under the Act of August 24, 1935, relating to payment bonds, a sub-contractor or material man may file suit after the expiration of 90 days from the day the last labor was done or material furnished, and within one year from the date of final settlement. A person who has no direct contractual relationship with the contractor must notify said contractor of his claim within the 90-day period by registered mail. For a complete description of details and procedure, you are referred to the act which is printed in 49 Stat. 793, 40 U.S.C.A., 270 (a), etc.'

"The Macri Company was bonded by the Continental Casualty Company, P. O. Box # 586, Yakima, Washington. It is suggested that the bonding company as well as the Macri Company, be notified of the account by registered mail."

(30) Plaintiff herein then appeared in said suit in Multnomah County, Oregon, and procured an order from the trial judge dismissing said suit on condition Plaintiff herein file a suit against the Macris on job specification #1068 in Seattle, Washington, which Plaintiff did and the trial court in addition also advised the said Defendants herein to file counter-claim in Plaintiff's suit in Yakima, Washington.

(31) 1-17-1946: After filing of Plaintiff's suit in Yakima, Washington, as aforesaid, the aforesaid conspiracy was furthered by Defendants Macri, Philp and Goerig and Continental Casualty Company, by delaying, appealing separately, delaying payment till 11-9-1949, in the following particulars:

When Continental Casualty Company then saw that Plaintiff's suit was not filed in damages as they had anticipated Plaintiff would file (if Plaintiff had filed in damages Continental Casualty Company could not have been held liable), but instead suit was filed in Quantum Meruit, and then Continental Casualty Company became concerned and anxious to have some solvent defendants added to the case. They then, for the first time, brought to Plaintiff's attention the fact that there should also be named as additional parties Defendant in Plaintiff's said suit a partnership composed of Clyde Philp and A. J. Goerig. Continental Casualty Company also secretly gave the following information to Plaintiff's attorney, said information contained

in a letter dated January 17, 1946, received from Harry L. Olson, Plaintiff's attorney in the Yakima suit, follows, to wit:

"As yet there has been no appearance by any of the Defendants in either of the cases here but I have just secured some information which will probably make it desirable for us to file an amended complaint. I have learned that a Mr. Clyde Philp and Mr. A. J. Goerig of Seattle had entered into a joint venture agreement with the Macris under which agreement they were to share in the profits and losses of this transaction, and my information is that both of these gentlemen are very much financially solvent while the financial position of the Macris may or may not be so good. I would like to hear from you as to whether or not Mr. Schaefer had any knowledge or information as to the connection of Mr. Philip and Mr. Goerig with this transaction or whether they were entirely silent partners as far as he was concerned. My information is also that the joint venture agreement was entered into in December of 1943, and that in July of 1944 another agreement was entered into under which the joint venture agreement was attempted to be terminated.

"* * *Confidentially and for your information, the source of my information as to the joint venture is from the bonding company in this case, which, of course, is anxious to have some solvent defendants added to the case, but I have assured

them that neither of us would reveal to the Macris or to Mr. Philip or Mr. Goerig the source of our information. * * *"

See copy of Agreement Terminating Joint Venture hereinabove under date of 7-15-1944.

Plaintiff also discovered for the first time during the course of the trial of said suit in Yakima, Washington, that Defendant Clyde Philp not only was a silent partner in the joint venture with Defendants Macris and Goerig, but also had signed as attorney-in-fact for Continental Casualty Company the bonds posted by Defendants Macris.

See copy of bonds hereinabove under date of 12-7-1943.

(32) 1-24-1946: Plaintiff's amended complaint in the Yakima cases was filed.

(33) 9-27-1946: Deposition on oral examination of M. C. Schaefer and Sam Macri was taken at Mr. Holman's office in Seattle, Washington.

(34) 1-7-1947: Order on Pre-trial came on for hearing on this date, and the last paragraph of said hearing on page 78 of the Transcript of record states as follows: "It is ordered and adjudged that the above stipulations be and the same are hereby approved and made a part of the record in the above-entitled cause, and that the trial of said cause be set for February 20, 1947, at 10:00 a.m." After 1-7-1947 and before February 20, 1947, Plaintiff was informed by his attorney, Mr. Olson, that the above

trial date of February 20, 1947, was set ahead and that said trial was set for February 24, 1947.

(35) 2-21-1947: Willard E. Skeel of Skeel, McKelvy, Henke, Evenson & Uhlmann, of Seattle, Washington, represented Continental Casualty Company in said law suit in Yakima, Washington, copy of the hearing on this date as recorded in the Transcript of record on pages 2239 to 2252, both inclusive, copy of said record follows:

In the District Court of the United States for the Eastern District of Washington, Southern Division

Civil No. 246

THE UNITED STATES OF AMERICA for the Use of M. C. SCHAEFER, an Individual Doing Business as CONCRETE CONSTRUCTION COMPANY,

Plaintiff,

vs.

SAM MACRI, DON MACRI, JOE MACRI, A. J. GOERIG and CLYDE PHILP, Individuals and Co-partners Doing Business as MACRI COMPANY, and CONTINENTAL CASUALTY COMPANY, a Corporation,

Defendants.

RECORD OF PROCEEDINGS AT THE TRIAL

Be it remembered, that on the 21st day of February, 1947, the above-entitled cause came regularly on

for trial in the above Court at Yakima, Washington, before the Honorable Sam M. Driver, Judge of said Court, sitting without a jury; the Plaintiff not appearing; the Defendants Sam, Don and Joe Macri appearing by Tom W. Holman, of Brethorst, Holman, Fowler, and Dewar, of Seattle, Washington; The Defendants, A. J. Goerig and Clyde Philp, appearing by Kenneth C Hawkins, of Brown and Hawkins, of Yakima, Washington; the Defendant, Continental Casualty Company, a corporation, appearing by Willard E. Skeel, of Skeel, McKelvy, Henke, Evenson & Uhlmann, of Seattle, Washington, and the following proceedings were had: (2485)

* * *

The Court: This same question is involved in all of the cases here against the Macris and the Continental Casualty Company, but I wonder if we shouldn't proceed on the record here in one of the cases, and then stipulate, if counsel is willing to do that, that it may apply in all of the cases?

Mr. Holman: Yes, your Honor.

The Court: Is there any particular preference, then, as to the case we should select for the record at this time?

Mr. Holman: I think not.

Mr. Hawkins: 257, I think that's the one that has the letters involved in it.

Mr. Holman: Well, in the event counsel feels that way, let's take 255.

Mr. Hawkins: Case 257 has these letters in evi-

dence, as to which we've made a special point, and will continue to make a special point.

The Court: Yes, I think that is true. Let's take 257; it has that question that isn't involved in the others.

* * *

Mr. Holman: Call Mr. Goerig to the stand. I am calling him under the rule, your Honor, as an adverse witness. (2486)

A. J. GOERIG

one of the defendants, called as an adverse witness on behalf of the defendant Macri, being first duly sworn, testified as follows:

Direct Examination

By Mr. Holman:

Q. Mr. Goerig, you are the Goerig mentioned in the papers which have been read to the Court here? A. Yes.

Q. I'll ask you whether or not you received a copy of Macri's Exhibit for identification 3, this statement of account that I had a moment ago?

A. I can't say that I did, no. I was never active in the office work. I was on the outside, normally

Q. And who was active in the office work?

A. Mr. Philp.

Q. Mr. Philp handled the office work and you handled the outside?

A. Mr. Philp handled the office details and I handled the outside.

(Testimony of A. J. Goerig.)

Q. And had you ever seen that before today?

A. I can't say whether I did or not. I've seen lots of reports and financial statements, but I wouldn't swear to that.

Q. When did you know that Sam Macri had made an assignment to the bank of his rights under these joint venture agreements to secure his loan at the bank? The one I'm saying (2487) is the same bank all the time, your Honor, Seattle First National Bank.

A. Oh, it was—I couldn't say; it was over a year ago I think. I never saw the assignment, but they were always bringing it up in conversation when I was in the bank.

Q. That is, the bank was?

A. The bank was, and they kept—well, they kept asking about it. If I may go on, I can describe how I knew about the assignment. They were after us to pay, and we refused until the loss was determined on the job.

Q. Mr. Goerig, that is the one other question I wanted to ask you, whether or not to the best of your knowledge and belief there has been any payment made by Philp and Goerig on specifications 1062 or specifications 1068, covered by these Plaintiff's Exhibits A and B?

A. That is on these two jobs in question here? Not to my knowledge.

Mr. Holman: That's all.

Mr. Hawkins: That's all, Mr. Goerig.

(Whereupon, there being no further questions, the witness was excused.)

* * *

Mr. Hawkins: Mr. Goerig, will you take the stand, please?

A. J. GOERIG

recalled as a witness in his (2488) own behalf, resumed the stand and testified further as follows:

Direct Examination

By Mr. Hawkins:

Q. Mr. Goerig, you are a partner of Clyde Philp? A. Yes.

Q. Doing business as Goerig and Philp?

A. Yes.

Q. Handing you Goerig and Philp's identification 2, will you state to the Court what that is?

Mr. Holman: It speaks for itself.

Mr. Hawkins: He's entitled to identify what is in his hands, for the purpose of the record. How is the appellate court going to know?

Mr. Holman: I submit the witness' conclusion is not the best evidence, your Honor.

The Court: I'll overrule the objection.

A. Well, it is a suit against Goerig and Philp, Clyde Philp and A. J. Goerig, individuals, and also Van Valkenburg and Mendel Rose; Suit by the First National Bank to recover, suing us for——

The Court: Well, I think that goes into too much detail.

(Testimony of A. J. Goerig.)

A. It is a suit of the bank for somewhere around $37,000.00.

Q. This is a copy of a summons and complaint that was served upon you? (2489) A. Yes.

Mr. Holman: That I have no objection to. I move the rest of it stricken.

The Court: Yes, it may be stricken. It is a copy of a summons and complaint served on him.

Mr. Hawkins: I will offer this in evidence, your Honor.

Mr. Holman: I object to it, your Honor, not on the question that this is not a substantially and probably a true copy; it purports to be a summons in King County case 381592, and a complaint, and a writ of garnishment, but the defendants are shown to be Philp and Goerig individually and as copartners transacting business under the name of Goerig Construction Company, Mendel Rose, and H. C. Van Valkenburg, and in the writ of garnishment and complaint they are shown to be doing business as the Rovan Trading Company.

The Court: It seems to me this copy of summons and complaint at best could be only somebody's assertion that there had been an assignment of one of the documents in evidence here, and the interests of defendants Macri under that instrument. I'll sustain the objection. It wouldn't be evidence that there was an actual assignment, it seems to me, and the fact that they've been sued I (2490) don't believe would be a defense here, the action

(Testimony of A. J. Goerig.)

in state court itself, unless there had been an assignment. That is just the view I am expressing of it.

Mr. Hawkins: I don't contend it is res judicata or anything of that kind. Mr. Macri has testified that he has made an assignment to the bank of the claims he has out of this termination agreement which is in evidence, and this evidences the fact that the Seattle First National Bank has started action upon that assignment which Mr. Macri testified he made, and I think we're entitled to show that. Counsel has inferred this was given merely for collateral purposes, and that they were really owners of it, and therefore entitled to bring this action, but the fact is the assignment was made and the Seattle First National Bank is attempting to foreclose on that collateral, and we're attempting to show that, to show that the Macris have no cross-complaint in this action, and it is offered for that purpose; if the objection is on the ground that is not a certified copy——

Mr. Holman: I said I didn't raise that at all, but Mr. Goerig's testimony already shows that he's known of this assignment since last July, or some time ago, so the defendants Philp and Goerig have not been diligent in submitting proof here of something of which they claim they had knowledge a long while ago, and this is not the (2491) best evidence; it is not competent evidence.

The Court: I will admit it for the limited pur-

(Testimony of A. J. Goerig.)

pose of showing that suit has been instituted against at least Mr. Goerig, and he's been served with a copy of summons and complaint based on the assignment. Exception will be allowed.

Mr. Skeel: On behalf of the bonding company I also wish to submit an additional objection to this document, in that it in no way affects the bonding company or third-party creditors, that is, the plaintiffs in this case. Furthermore, since there is no copy of the assignment on there, and since the summons and complaint shows on its face that it has to do with a job outside and additional to the jobs which this suit are based on; in other words, this is based on 1062 and 1068; I believe the complaint shows it is based on some other job having nothing to do whatsoever with this case.

Mr. Holman: I would like to join in the surety's objection also, principally on behalf of the creditor plaintiffs; they're not here.

Mr. Hawkins: In a sense counsel is correct, that it is based on a loss on another joint venture. However, it is one of the joint ventures mentioned in the termination agreement, and the complaint recites that the assignment has been made on all of these adventures, and therefore (2492) it is a simple matter for the bank, if they so choose to do, to amend that complaint and include this as well as the others. Of course, the reason they haven't done it at this point is that the loss hasn't been ascertained, but it will be done, there is no question about that.

(Testimony of A. J. Goerig.)

The Court: I'll overrule the objections, and admit it for what it is worth.

Mr. Holman: Exception.

Direct Examination
(Continued)

By Mr. Hawkins:

Q. Mr. Goerig, do you know Mr. Macri?

A. Yes.

Q. Did he handle these jobs that we're concerned with here, 1062 and 1068? A. He did.

Q. Did you have anything to do with these jobs?

A. No.

Q. Did you order any of the materials that are sued on in these actions? A. No.

Q. Did you order any of the labor in connection with those jobs? A. No. (2493)

Q. Did you have any supervision of those jobs?

A. No.

Q. Did Mr. Philp have any supervision of those jobs? A. No.

Q. They were solely under the direction and control of Mr. Macri?

Mr. Holman: Just a minute; I think on this last question I'll object on the ground it is leading.

The Court: It started out to be. Proceed.

Q. Did anyone other than Mr. Macri have anything to do with these jobs?

A. The Macri Company.

Q. That is—— A. Don, Sam——

Q. The Macri brothers?

(Testimony of A. J. Goerig.)

A. The Macris, the Macri Company.

Q. Did you ever receive any of the letters that have been introduced in evidence here today?

A. I haven't seen them.

Q. With more particular reference to Plaintiff's C, D, E, F, G, H, I, J, and K?

A. No, I never saw any of them.

Q. Your answer was no? A. No.

Q. That they were never called to your attention. Where (2494) did you and Mr. Philp maintain your office at the time these jobs were in progress? A. In the Lloyd Building, Seattle.

Q. And did the Macris have their own separate office? A. Yes.

Q. Where was that located?

A. Down off Jackson Street in Seattle, I think that they had it.

Mr. Hawkins: You may cross-examine.

Cross-Examination

By Mr. Holman:

Q. Mr. Goerig, it has been a fact, has it not, to the best of your information, that from the time you entered the joint venture agreements pertaining to these jobs, shown by Plaintiff's Exhibits A and B on to the completion of these jobs the work was conducted by Macri and Company, correct?

A. It was conducted by Macri and Company.

Q. Yes, sir. What, if anything, at any time, in any way, did either Mr. Philp, to your knowledge,

(Testimony of A. J. Goerig.)

or you do toward notifying any of the material men, laborers, or otherwise on those jobs that you had terminated the Exhibits A and B?

Mr. Hawkins: Just a moment. Your Honor, there is not one iota of evidence in the record here that the material men or the plaintiffs in this case ever knew (2495) about the joint venture agreement in the first place, so it becomes entirely immaterial whether a notice was given of the termination.

Mr. Holman: I want to know if he did notify anybody.

Mr. Hawkins: Well, it is immaterial. There is no testimony that they knew of it in the first place.

The Court: Well, I'll overrule it, and determine the effect of it.

The Witness: No.

Q. You knew, did you not, that there was material being furnished, there were labor items being accumulated, work was being performed there, did you not?

A. Well, on such a job there is always material and labor, yes.

Q. Now, is it or is it not a fact that the time the joint venture agreements, Macri's Exhibits 1 and 2, were entered into, that there was to be a bond signed by Macri and Company? Obligation for the performance of those jobs, to be——

Mr. Hawkins: I object to this question, your Honor. It is not material or germane to the direct examination at all.

(Testimony of A. J. Goerig.)

The Court: I'm not sure that I got the question. Read it. (2496)

Mr. Holman: May I re-state the question, your Honor?

The Court: All right.

Q. What I would like to know, Mr. Goerig, is whether or not you knew that each of these jobs covered by Plaintiff's Exhibits A and B required and would have to have surety bonds?

A. I think in this case the bonds were already up by Macri and Company.

Q. You knew that?

A. I'm not positive now on that question.

Q. At least, it was a current matter that you were informed about, was it not, Mr. Goerig?

A. It was what?

Q. A current matter at the time you signed Defendant's Exhibits 1 and 2, it was a current matter that the bonding of these jobs would be covered?

Mr. Hawkins: Your Honor, I again renew my objection, I don't think your Honor ruled on it the first time, namely, that this is not germane to the direct examination. I did not go into this question of the bond at all. I ask that all that testimony be stricken. I made an objection and there was no ruling of the Court on it.

The Court: I think I'll sustain the (2497) objection. The bond wasn't gone into on direct; it isn't cross-examination. Of course, I don't know that it is of very much practical concern, because

he has been the witness of both sides here, and being an adverse witness, you could examine him by leading questions anyway. If you wish to open up your direct examination, I'll permit you to do so for that purpose.

Mr. Holman: I'm satisfied with the direct examination. No further questions.

(Whereupon, there being no further questions, the witness was excused.)

* * *

(The following stipulation was entered on February 25, 1947, during the trial of cause No. 246, and while the witness, R. M. Moorhead, was testifying on behalf of the defendants Macri.)

Mr. Hawkins: Will the record also show the objection as to Goerig and Philp?

I would like to ask that counsel stipulate any objection made by a defendant will apply to all defendants.

Mr. Olson: That is agreeable.

The Court: All right, the record may show that.

Reporter's Certificate

United States of America,
Eastern District of Washington—ss.

I, Stanley D. Taylor, do hereby certify:

That I am the regularly appointed, qualified and acting official court reporter of the District Court of the United States for the Eastern District of

Washington. That as such reporter I reported in shorthand and transcribed the foregoing proceedings before the Honorable Sam M. Driver, Judge of the District Court of the United States for the Eastern District of Washington, held at Yakima, Washington, on February 21, and February 25, 1947.

That the above and foregoing, consisting of 14 numbered pages (exclusive of this page) contains a full, true and accurate transcript of a stipulation and the testimony of A. J. Goerig occurring on February 21, 1947, and a stipulation occurring on February 25, 1947, including all objections and the court's ruling thereon.

Dated this 2nd day of August, 1947.

/s/ STANLEY D. TAYLOR,
Official Court Reporter.

Plaintiff had no knowledge of said suit coming on for trial on the 21st day of February, 1947, and was not present or represented by his attorney on this date and, in fact, did not know of these facts until on or about the 19th day of August, 1950.

(36) 3-21-1947: This is the date on which the Court rendered its Opinion in the trial had upon the merits of Plaintiff's complaint, and of Defendants' answer and cross-complaint in Plaintiff's suit in Yakima, Washington, which ultimately resulted in judgment in the trial court in favor of Plaintiff and

against the Defendants of Plaintiff's suit for Quantum Meruit, and also in a judgment against Defendants and in favor of Plaintiff in the sum of One Dollar as to Defendant's cross-complaint in which said Defendant alleged damages of $40,000.00. Copy of Court's Opinion follows:

Yakima, Washington, Friday, March 21, 1947, 9:00 o'clock a.m.

(Whereupon, all counsel presented their final arguments to the Court.)

COURT'S OPINION

The Court: Mr. Olson, I think I might save time here by announcing the Court's views, and then I'll give you an opportunity to be heard on those points on which my ruling is adverse to you or your client, Mr. Schaefer.

I necessarily will have to deal with these issues generally, and what I am trying to do is to lay some reasonable basis for the drafting of the findings of fact and conclusions and the various judgments that will have to be entered.

Taking up first Mr. Schaefer's suit against Mr. Macri on subcontract 1062, the arrangement there was that Mr. Schaefer was to construct the concrete structures in place, furnishing certain materials that were listed in the subcontract. Mr. Macri agreed to furnish the form lumber and to do the excavation work. The specifications that are in evidence here pertain, or do not contemplate, I should say, any subcontracting of a part of this work.

They naturally pertain to the work of the general contractor under his contract with the government, and they provide that the government will pay for excavations in those instances where clearance is required in the excavations, the removal of common earth one foot out from (2451) the base of the concrete structure and on a slope of one to one. The government naturally was concerned wholly with the matter of payment, because since they required only that these structures be built and installed according to specifications in the places specified by them, it didn't make any difference to them how much excavation the general contractor might make or might not make. All they required of him was that he put in the concrete according to their requirements, but here we have a dividing of the work, not, certainly, directly contemplated by the specifications, where the contractor is to do the excavating, and the subcontractor is to build and install the forms and pour the concrete.

In that case there would be an implication, certainly, that the excavation was to be done in such a way as to afford reasonable clearance, a reasonable opportunity for the subcontractor to properly and efficiently and without undue expense put his forms in the excavation and carry out his part of the work.

It is the view of the court that the pay provisions of the specifications as to clearance and slope are not absolute requirements. I do not believe that they obligated Mr. Macri to cut the banks to a slope

of one to one in those instances, as I have said, where clearance was required, where a form had to be placed between the concrete and the bank, but I think that they are very persuasive as to what would be (2452) reasonable. The Reclamation Bureau, with its long experience in construction of this kind, I assume wouldn't pay for more excavation of more dirt than was reasonably necessary for the contractor to install his form, so I think the best evidence we have, the best indication we have, as to what was reasonably required is the fact that the Reclamation Bureau would pay for dirt excavated one foot out at the base and on a slope of one to one.

The evidence is overwhelming that excavation was not made in that manner. It was made, the Court finds, approximately one foot out from the base, with practically vertical banks; that is, with only the slope that would naturally result from the excavation by the use of Macri's hoe-type shovel. A significant piece of testimony, it seems to me here, is that of Mr. Ashley, who was Macri's superintendent for a period of time on this job. He testified, if my memory serves me right, that during his period as superintendent he staked out the excavations to be dug, and that his stakes were one foot out from the outer wall of the concrete at the surface of the ground; that he staked them out that way, and certainly the people who came after him would follow the superintendent's directions, and excavate them not more than one foot out, and

that's not at the base, it was at the surface, so there was no effort on Mr. Macri's part to excavate out one foot, and it seems to me equally obvious, aside from the testimony in (2453) the case, that that was not reasonable and proper clearance in the structure and form. We have in evidence here there are between the concrete and the outer bank the shiplap, which I assume would be approximately an inch thick, less whatever is planed down, the two-by-fours forming the framework, and then what's been referred to, I think, as the strongbacks, an additional two-by-four there, which makes approximately nine inches of form outside of the concrete, so that a foot would give only an additional clearance of three inches, which obviously isn't sufficient regardless of the manner of operation of this so-called shebolt or clamp, or whatever it may be; and the court finds that the excavation was not done in a manner to give sufficient clearance, that there was not sufficient slope, there was not sufficient width in the excavations to enable the subcontractor to efficiently and properly install his forms, and that he was delayed and hindered in the progress of the work, and that his carpenters installing the forms had to make extra excavation, and that this was the rule rather than the exception in the progress of the work.

In that connection, I find also that the fine grading was not done according to the layout plans and specifications, that it was defectively and improperly done, and that in most instances the carpenters

had to do the fine grading before they could install the forms, and that that also increased (2454) the amount of work Mr. Schaefer had to do, and hindered his progress and interfered with his progress of the work.

I also find that the excavations were not made on time and in an orderly sequence and manner, so as to enable the subcontractor to proceed as he should have been able to do with prompt progress of the work.

Now, with reference to the lumber which Mr. Macri was to furnish under the subcontract, I find on the evidence here that sufficient lumber was not furnished; it was not furnished on time, and the quality was not proper and suitable for the work intended. It is true, I think, that there was some lumber there most if not all of the time during the progress of the work, but much of the time there was missing some essential type of lumber, such as the two-by-fours or the shiplap or some particular kind of lumber or plywood required, so that the work was hindered and delayed because of the lumber not being promptly furnished, not furnished in sufficient quantity, and not furnished in the quality that was the minimum requirement, I should say, for work of this kind.

I make that finding despite Macri's identification 104, because I think Miss Callahan testified that she had been told what bills to put in here; she made up that exhibit from the invoices that had been sent in by people furnishing lumber. She didn't know whether the lumber went on the job or not, and

took the invoices at the direction of somebody (2455) else, and then Mr. Klug testified that that was the kind of lumber that could have been used on this job; my recollection of the testimony is that he didn't say that this particular lumber was used, but it was the kind that could have been used on the job, and I think Mr. Klug on the stand tried to minimize the situation with reference to the shortage of lumber. I think his statement more clearly represents the fact that there was a shortage of lumber, as he said in his statement.

In short, the court finds that Mr. Macri breached the subcontract, or those portions of them to be performed by him in the particulars which I have designated; that his breach was willful and negligent, and that was true both as to the character of excavations and fine grading and time it was done, the amount and quality of lumber and the time it was furnished, and that this breach of Mr. Macri's part was a continuing breach, which continued and existed and persisted throughout the entire performance of this contract until the very end of its performance by Mr. Schaefer.

I think that the conversations between Mr. Macri and Mr. Schaefer were substantially as testified by Mr. Schaefer and his witnesses. I think that on these occasions mentioned Mr. Schaefer complained, and in that connection Mr. Schaefer complained, he or his men complained, repeatedly and frequently to Mr. Macri and to Mr. Macri's agents on the job, and Mr. Macri (2546) had notice of these complaints. He had notice and knowledge of his failure

and his agents' failure to perform the contract according to its terms; that he accepted and acted upon oral complaints and notices to that effect; that he knew of the condition, and that he waived any and all requirements as to written notice contained in the contract, by his conduct.

Coming back to those conversations, it is the view of the Court that Mr. Schaefer did complain, and stated that he would pull off the job, or in effect, that if conditions weren't improved, and that Mr. Macri on several occasions promised that he would do better, and that he would see that things were done in accordance with the requirements of the contract, or in a proper manner, and that he did tell Mr. Schaefer substantially as Schaefer and his witnesses testified, that if he would go on and complete the contract, he wouldn't lose anything on the contract, nobody had ever lost on his contracts, and that he would make it right and pay him for what he might lose under the adverse conditions created.

However, the court cannot find under the record here that there was a meeting of the minds, or an express contract that Mr. Schaefer was to continue to complete the work and do what fine grading was required by the defective conditions of the excavations, and was then to be paid for the reasonable value of all his costs. I think such a finding would be inconsistent with the other testimony in the case here, and (2457) with the conduct of Mr. Schaefer. He refused specifically to take over the fine grading and excavating when Mr. Macri, according to the

testimony, offered to turn it over to him. He continued to complain. It's hard to conceive how he would have cause for complaint if he was to get paid for everything anyway, but he continued to complain, and I think his conduct isn't consistent with a meeting of the minds and an express contract that Mr. Macri was to pay for the fair value of the services.

However, I think that Mr. Macri did by his representations induce Mr. Schaefer to go on, by his promises that the bad conditions would be remedied. I think that Mr. Schaefer did go on by reason of these representations, and performed this work, which was accepted by Mr. Macri and which went into the job, and that under the circumstances it would be extremely inequitable for Mr. Schaefer not to be paid the fair and reasonable value of his services. In other words, it is the view of the court that there was an implied contract, or perhaps it would be more accurate to say a quasi-contract, that Mr. Schaefer was to be paid the fair and reasonable value of the performance of this contract under the conditions and with the extra burdens imposed upon him by Mr. Macri's breach.

Now, coming to the law applicable to this situation, it is of course difficult, and I am frank to say I think that the case cited by Mr. Ivy, United States vs. John A. Johnson and Sons, (2458) 65 F. Supp., page 527, if it were followed, would preclude recovery by Mr. Schaefer, at least against the bonding company. However, it is my view that in these

cases, although there is involved the construction of the Federal statute, the Miller Act, that nevertheless, so far as the substantive rights are concerned, that the law of the state is entitled to first consideration. This act, which the courts have said numerous times should be liberally construed, because of evidences and intent on the part of Congress that all persons furnishing labor and materials that go into public contract work should be fairly and reasonably compensated for their services, is very closely analogous to the public improvement statutes of the State, and as I read the cases, while there is none that is squarely in point with this one in its facts, the implication of the decisions of the Washington State Supreme Court and the language employed indicates that that court subscribes to rules similar to that applied in Susi vs. Zara, that where the contract is breached by the main contractor, the subcontractor is then entitled to the fair and reasonable value of his services rendered in performance of the work, and that that includes an appreciation of the amount necessary to spend by reason of the breach, including delay occasioned by the main contractor.

The Susi case, as has been pointed out, is not squarely in point here, perhaps because there the contract was never (2459) completed by the subcontractor, and the question was not decided as to whether the subcontractor in recovering the fair and reasonable value of his services could go entirely beyond the total amount of the bid price

provided in the subcontract. In the Susi case, the main contractor took over the contract when it was partly performed, and made it impossible for the subcontractor to complete it, and the court held that the subcontractor could recover for the reasonable value of the work and services performed up to that time, and was not bound by the unit prices of the contract, and could recover against the bonding company. I think the thing that makes the Susi case applicable here was that here we have a continuing breach. There was a completion of performance, it is true, but there was a breach right up to the last day of the work, by Mr. Macri; there continued to be a breach, and therefore I think the principle of the Susi case would apply.

Mr. Schaefer, electing to perform in the face of the breach by the main contractor, was entitled to the fair and reasonable value of the work, and since the recovery is not for damages for contract, but for the fair and reasonable value of the services, I think under the decisions of the State court that Mr. Olson cited here and were cited in his brief, that the subcontractor is entitled to recover on that basis against the bonding company also. (2460)

The case that hasn't been cited here, and is very closely analogous to this one as to facts, McDonald vs. Supple, an Oregon case, 190 Pacific 315, I think deserves attention. It is, of course, only persuasive, as the Pennsylvania Federal District Court case is persuasive, not controlling, but it appeals to me as being equitable, and squares fairly well with what

the Supreme Court of the State of Washington I think has indicated as its view in cases of this character. In McDonald vs. Supple there was a government contract to construct dredges by the subcontractor, parts and materials to be furnished by the main contractor. The subcontractor brought suit on the theory that there had been an oral modification of the written contract. The lower court held that there had not been an express modification of the written contract by oral agreement. The plaintiff then amended, alleging that there had been an implied modification by implied agreement, to pay the fair and reasonable value of the work done and required to be done by reason of the breach of contract on the part of the main contractor.

The court held first that there was no inconsistency between an allegation of an expressed oral modification and an allegation of an implied contract to pay the fair and reasonable value, and overruled a demurrer to the amended complaint. The court also sustained recovery on the basis of the fair and reasonable value of the services, and the amount (2461) and value of the work to be done by the subcontractor was greatly increased in that case because of circumstances closely analogous with those in this case, that is, that the materials to be furnished by the contractor were not furnished in time, nor in an orderly manner; they were defective; the subcontractor had to have a large crew of skilled workmen standing by; they

couldn't work efficiently because of the breach of the contract on the part of the main contractor. The court on page 317 of the opinion states:

> "The amended complaint averred, and the testimony on behalf of the plaintiff tended to show the defaults on the part of the defendant Supple in the performance of the original contract were so numerous and so vital that they caused the plaintiff Wakefield to perform his labor under different conditions, at a different time, and in a different manner than contemplated or agreed upon by the parties in the original writing, and so much more burdensome and difficult than was originally agreed upon that plaintiff Wakefield was not required to accept the compensation fixed in the original contract as the measure of his recovery, but by reason of the important changes in the work to be done, and the defaults on the part of defendant Supple in his performance of the contract, plaintiff is entitled to recover in addition to the contract price, such a sum as would reasonably compensate him for the services performed by him and accepted by the defendant."

And again on page 318:

> "The testimony on behalf of the plaintiff tended to establish such changes in the work caused by the failure of the defendant to perform his part of the contract which made the labor more burdensome and extended the same

> to two or three times the amount it would ordinarily have been if the material had been delivered at the time and in the condition agreed upon. Therefore the plaintiff could properly recover on quantum meruit."
>
> (Cases cited.)

This paragraph is also rather interesting; it throws light on one of the controversies in this case, continuing on the same page:

> "Under the contract Wakefield was entitled to partial payments as the work progressed, and he submitted various statements to defendant with such object in view, and accepted money under such estimates. It was not contemplated that such advance payments should be a final settlement of any part of the work, and the contention of defendant that plaintiff is thereby estopped from claiming additional compensation cannot be maintained. The evidence tended to show that in different conversations between Wakefield and Supple, the latter told Wakefield in effect to go ahead and do the work, and Supple would make it all right with him when he got through."

Now, as I say, of course that case isn't controlling; it is merely persuasive, but it appeals to the court as appropriate, and not, certainly, in conflict with the announced decisions of the Supreme Court of the State of Washington. Now, I should say, too, of course, that the bonding company was

not involved in the Supple case, but it seems to me that it logically follows that if recovery is allowed on quantum meruit, that is, for the fair and reasonable value of the services that go into the work, that it isn't damages, as was held in the Pennsylvania case, but is for work and services that entered into the work, and that the bonding company should be held to compensate for the work and services.

Certainly the rule is that a bonding company which has a performance bond for a main contractor is not bound, to its detriment, by the provisions of the subcontract as to the price of the work to be performed. If a general contractor makes a subcontract to do a part of the work for twice its reasonable value, the bonding company isn't bound by that contract, and conversely, it seems to me they should not be able to claim the price in the subcontract to their benefit, where the reasonable value of the work and services under the (2464) circumstances that they were actually performed exceed the contract price.

Now, that brings us to the question of the amount which Mr. Schaefer is entitled to recover. The plaintiff's Exhibit 63, which is the plaintiff's statement of costs on this work, I think forms a fair basis for determining the amount of recovery. However, I'll say at the outset that it is the view of the court that plaintiff is not entitled to recovery of interest prior to the entry of judgment. It seems to me that this is an unliquidated claim. It necessarily must be so. If Mr. Schaefer is entitled to

recover only for the fair value of his services, it required and would require testimony as to the amount and value of those services, so that they could not be liquidated until that evidence is received and passed upon by the court, so that the view of the court is he's not entitled to interest prior to the date of judgment. $57,618.87, and from that I think should be deducted the legal expense of $533.57, and the engineering expense of $201.25.

I had some difficulty coming to a conclusion as to whether general overhead should be included. I'm inclined to think that it should, because it is a part of the fair and reasonable value of this work. A carpenter doesn't just go out by himself and build forms, or the workman pour concrete. He does it under the direction and aid of an established (2465) business organization, and all of the expenses of that organization, including general overhead, go into the work. The item of profit is another troublesome one. However, as I recall, in the Denny Regrade case a profit of fifteen per cent was allowed there on one of the extra items, to Vigilante, I believe it was, on the transporting of the dirt to the place where it was dumped in Elliott Bay. At any rate, I'm inclined to allow $57,618.87, less the two items mentioned, for engineering services and legal expense.

The bonding company is entitled to judgment back against Macri for the amount and costs and a reasonable attorney fee. It is difficult to make a compromise or adjustment between what should be

paid for a long, drawn-out case of this magnitude, with the amount involved, and some consideration for what the traffic should be required to bear in the way of the burden imposed upon the losing parties here. I am inclined to think that while it would not be adequate under other circumstances, that fifteen hundred dollars would not be unfair or out of the way. Have you any suggestion on that, Mr. Ivy? I would welcome a suggestion if you wish to make it, before I definitely fix an attorney fee.

Mr. Ivy: Your Honor, in my brief I left it to the discretion of the court.

The Court: Yes, I know you did. Well, that's the amount the court determines. Now, we come to the question of (2466) whether the bonding company can recover judgment back against Goerig and Philp. I'm inclined to think they can. I haven't my notes here. I find myself somewhat in the position of a man who gets chlorine gas. He drowns in his own secretion. I'm almost at that point with my notes I have taken. I haven't my notes here, but I have a general statement of the law as to dormant and silent partners. This joint venture creates a situation that I think we can, for the purpose of this case, say is analogous to a partnership. Once you establish joint venture, about the only difference between it and a partnership is the difference in the scope of the two as to what business and activity is covered, but here we have a situation analogous to that of a partnership, in

which two of the partners, Goerig and Philp, are dormant or silent partners, and the statement of the law which I have in mind is from Corpus Juris, to the effect that the liability of a dormant partner prior to dissolution of the partnership, on any contracts entered into by one authorized to do so for the partnership, and within the scope of the business, the liability of a dormant or silent partner does not depend upon knowledge of the third person to the contract or dealing with the same, of the existence or relationship of the silent partner; that it depends upon the silent partners being parties to the authorized contracts of the partnership, and further based upon a consideration of public policy because it would open the door wide to chicanery and fraud if people were permitted to make secret agreements as to their liabilities which they could change at will to the detriment of third persons, so that the liability does not depend upon the fact that the person dealing with a firm knows of the existence of a silent partner and depends upon his credit.

If the partnership enters into an authorized contract during the existence of the partnership, the silent partners then become members of that partnership, or become parties to that contract, the same as if they had personally signed it, and are bound until they are released in a way by which parties can ordinarily be released from their contracts, and here I consider it immaterial that as to 1062 the bond application was actually signed prior

to the execution of the joint venture, because I think a partnership may adopt, as this one expressly did, may adopt prior contracts of one of the parties just as they may be bound by subsequent contracts, and I think here under the circumstances and the wording of this joint venture, that the parties did expressly or by implication adopt the contract of Mr. Macri with the government on 1062, and with the bonding company on the application for the bond on 1062, and of course, the bonding company having once been bound continued to be bound. Its obligation was fixed and determined, and what remained then (2468) was to just ascertain the extent of the liability of the bonding company, in the light of subsequent events. The bonding company couldn't release itself once it had executed the bond, and therefore I think Goerig and Philp became bound under the indemnity contract, indemnity against loss, contained in the application executed by Mr. Macri.

As to Goerig and Philp's liability to Schaefer, and while it might seem at first blush that that is unimportant, I think that it might very well be, because this is a close case, and these questions are close and in some respects novel ones; and if the appellate court should hold that the bonding company are not liable, then I think the question of whether Goerig and Philp are bound would be important. I don't think they are, because it is a quasi-contract arising after the contract terminating the joint venture. That contract, still carrying the analogy of the partnership, I think dissolved the

partnership; it terminated it, brought it to an end. The only thing remaining then was a contract that Goerig and Philp would reimburse Macri under certain circumstances, for a portion of his losses, and I don't believe Goerig and Philp should be liable for any contract entered into in the name of this joint venture, or by Mr. Macri operating for it, subsequent to the date of the agreement terminating the joint venture, and as I view the theory of this case, and the theory upon which I decide it, that contract, quasi or implied (2469) contract, arose out of conduct that was subsequent to the termination agreement.

I am announcing these things, Mr. Olson, as I stated at the outset, with the understanding that in any points where my decision is adverse to your client, you will have an opportunity to be heard before my ruling becomes final. I thought it might save time if I just announced what I had in mind here.

Mr. Olson: It undoubtedly has, your Honor.

The Court: Is there anything that I've overlooked here, between one party and the other?

Mr. Holman: I call your Honor's attention to the fact that Macri affirmatively pleaded——

The Court: Oh, yes, 1068, you mean?

Mr. Holman: Oh, no; Macri affirmatively pleaded and proved the levy by the United States arresting any funds in the hands of Macri that might then be due to Mr. Schaefer, and Mr. Schaefer admitted on the stand that that had not been paid, so I think

that's an issue here and we're entitled to that protection.

The Court: Well, it isn't directly before the court here. This court can't decide now whether Mr. Schaefer owes the government ten thousand dollars, or whatever it may be, or whether he doesn't owe them. This notice of levy is in the nature of or might be analogous to a writ of garnishment (2470) against you.

Mr. Holman: Yes, your Honor, and we've pleaded that, and Mr. Schaefer has admitted the obligation is still due, and it's not been denied.

Mr. Olson: Mr. Schaefer said he had not paid that to the government, that's all.

The Court: But he hasn't admitted liability on it, as I understand it. Well, it seems to me about the only thing I can do here is to provide that any action to enforce collection of this judgment as to Mr. Macri, to the extent of the amount shown in this, shall be stayed until determination of this controversy.

Mr. Holman: That's my idea.

The Court: That will protect your client from the payment of that part of the judgment, and when I asked if I had overlooked anything, I meant as to 1062. I haven't, of course, got to 1068 yet.

Mr. Ivy: One matter I wasn't clear about in 1062. You made a statement that the bonding company would only be liable for the fair and reasonable value of the services under quantum meruit that had been allowed against the principal contractor, but not in excess, I understood, of the contract. You were dis-

cussing the amount of the value, the extent of the contract.

The Court: No, I didn't intend to make any such statement (2471) as that. I'm glad you called it to my attention, because I had overlooked saying that the court finds that the fair and reasonable value of the work and services performed and materials furnished by Mr. Schaefer in the prosecution of the work contemplated by specifications 1062 is the amount shown in his exhibit 63, plaintiff's exhibit 63, with the exceptions noted of interest and attorney fees and engineering service. The court finds that is the fair and reasonable value of the work and services performed under the circumstances created and existing by Mr. Macri's breach. Now, as to 1068, the court finds that there was a breach of that contract by Mr. Macri.

Mr. Olson: I hesitate to interrupt, but that item of fifty-seven thousand, that's after, of course, there has been credited on the——

The Court: I see what you have in mind. I didn't mean to use that particular item. I'm glad you called that to my attention. The court finds that the fair and reasonable value of the work and services are as stated in this exhibit, prior to the application of the amount paid, with the exceptions I have noted already.

As to 1068, the court finds the defendant Macri breached that contract; at the time he called upon Mr. Schaefer to perform, there were no excavations there, and even up to the time he gave notice he was taking it over, there had never (2472) been any

excavations fine graded and ready to receive forms. It would have been impossible for Mr. Schaefer, and was impossible, for him to comply with the demand that he proceed with 1068. However, under the circumstances existing here, the court is of the view that the showing of damages by way of loss of prospective profits is too speculative and uncertain and vague to warrant a recovery on the part of Mr. Schaefer. It's true that there is evidence as to what this work could have been done for, but looking at it broadly, the court must recognize Mr. Schaefer had lost a lot of money on one contract; he was still engaged in that contract under an arrangement where he had to continue regardless of the difficulties encountered; his equipment was tied up, and continued to be until about March or April, 1945, I believe, and under the circumstances it doesn't seem to me that there's a showing here that Mr. Schaefer could have arranged for, bought or rented additional equipment, could have come on here and made a profit on this work, assuming, and I'm not too sure about that, that prospective profits could be recovered in a case of this kind.

The judgment of the court will be, therefore, subject to hearing counsel on the matter, that Mr. Schaefer should recover one dollar nominal damages against Macri only on 1068. Now, if you wish to be heard, Mr. Olson, I think you have some time left. (2473)

(Argument by Mr. Olson.)

The Court: Well, I know it is a close and difficult question, but I'm still of the view that there wasn't a substantial beginning of the performance of this contract until about the 31st of July, as I remember, or the first of August, when they started pouring concrete, and while the conduct of Mr. Schaefer, or Mr. Macri, I mean, would relate back to those conversations, I don't regard any one of them as final and controlling importance. I think the conversations, taken with the continuing breach by Mr. Macri, and his conduct, give rise to a situation where Mr. Schaefer was entitled to compensation for the fair and reasonable value of his services, and the services were rendered after the termination agreement. I know it's close, but I'm still of that opinion. My statement, by the way, that there hadn't been substantial performance by Mr. Schaefer, I didn't mean to say that Mr. Schaefer didn't do everything he could up to that time in the way of preparation in the light of the breach by the other party. I just wanted to make that clear.

I might say that I always try to keep my mind fixed so it can be changed on occasion, and I shall go over these briefs that have been submitted. I haven't had sufficient time to properly digest Mr. Ivy's brief, although he went into it to some extent in his argument, and I just received Mr. Holman's last brief, and I'll go over these, and I don't want (2474) to rehash this whole thing over again. I'll consider all of these points, and if I come to some different conclusion in whole or in part, will advise counsel prior to the time that the findings and judgment are entered. (2475)

5-1-1947: Date judgment was filed. Copy of judgment follows:

Volume I—Pages 112-115. Transcript of Record

In the District Court of the United States for the Eastern District of Washington, Southern Division

Civil Action No. 246

THE UNITED STATES OF AMERICA for the Use of M. C. Schaefer, an Individual Doing Business as Concrete Construction Company,

Plaintiff,

vs.

SAM MACRI, DON MACRI, JOE MACRI, A. J. GOERIG and CLYDE PHILP, Individuals and Co-Partners Doing Business as Macri Company, and CONTINENTAL CASUALTY COMPANY, a Corporation,

Defendants.

JUDGMENT

The above-entitled cause having come on duly and regularly for trial before the Hon. Sam M. Driver, Judge of the above-entitled Court, on the 24th day of February, 1947, the use Plaintiff, M. C. Schaefer, an individual, doing business as Concrete Construction Company, appearing in person and by his attorney, Harry L. Olson, of Olson & Palmer, and the Defendants Sam Macri, Don Macri and Joe Macri appearing by Sam Macri, and each of said Defendants Macri appearing by and being represented by their attorney, Tom W. Holman of Brethorst, Holman,

Fowler and Dewar, and the Defendants A. J. Goerig and Clyde Philp appearing by A. J. Goerig and their attorney Kenneth Hawkins of the firm of Brown & Hawkins, and the Defendant, Continental Casualty Company, appearing by its attorney, Eugene D. Ivy, and the Plaintiffs having waived in open Court their demand for jury, upon motion having been made by each of the Defendants for withdrawal of the case from the jury and the case having proceeded to trial before the Court without a jury, the Hon. Sam M. Driver presiding and having heard and considered the evidence submitted by the parties, both oral and documentary, and having heard and considered the arguments of counsel and written briefs filed in the matter, and the (82) Court being fully advised in the premises and having heretofore made and entered its Findings of Fact and Conclusions of Law, now, therefore,

It Is Hereby Ordered, Adjudged and Decreed That the use Plaintiff, M. C. Schaefer, have and recover judgment against the Defendants, Sam Macri, Don Macri and Joe Macri, individuals and co-partners, doing business as Macri Company, and the Continental Casualty Company, a corporation, and each of them, for the sum of $56,764.97, together with interest thereon at the rate of 6% per annum from the date hereof until paid, and for the use Plaintiff's costs and disbursements herein expended and incurred in the amount of $921.70.

It Is Further Ordered, Adjudged and Decreed That Plaintiff's complaint as to the Defendants

A. J. Goerig and Clyde Philp be dismissed with prejudice and without costs.

It Is Further Ordered, Adjudged and Decreed That the Defendant, Continental Casualty Company, an Indiana corporation, have and recover judgment against the Defendants Sam Macri, Joe Macri and Don Macri, A. J. Goerig and Clyde Philp, and each of them, in the amount of $56,764.97, together with interest thereon at the rate of 6% per annum from the date hereof, and for the further sum of $1,-750.00 for said Continental Casualty Company's attorney's fees herein, and for its costs and disbursements herein taxed in the amount of $none, together with interest at 6% from the date hereof.

It Is Further Ordered, Adjudged and Decreed That the use Plaintiff, M. C. Schaefer, have and recover judgment against the Defendants, Sam Macri, Joe Macri and Don Macri, co-partners and individuals, doing business as Macri Company, for the sum of $1.00 damages as to Specifiications 1068 which amount shall bear interest at 6% per annum from the date hereof.

It Is Further Ordered, Adjudged and Decreed That the cross-complaint of the Defendants, Sam Macri, Joe Macri and Don Macri, against the use Plaintiff be and the same is hereby dismissed with prejudice and without costs and that said Defendants recover nothing thereby.

It Is Further Ordered, Adjudged and Decreed that the judgment of the use Plaintiff entered herein is subject to the lien of the United States of America under its certificate of levy, copy of

which was received in evidence as Macris' Exhibit 67. (83)

It Is Further Ordered, Adjudged and Decreed That the cross-complaint of Sam Macri, Joe Macri and Don Macri against the Defendants A. J. Goerig and Clyde Philp be and the same is hereby dismissed without costs.

It Is Further Ordered, Adjudged and Decreed That the cross-complaint of A. J. Goerig and Clyde Philp against the Defendants, Sam Macri, Joe Macri and Don Macri, be and the same is hereby dismissed without costs.

Done in Open Court this first day of May, 1947.

SAM M. DRIVER,
Judge.

Presented by:

HARRY L. OLSON,
Of Attorneys for Plaintiff.

[Endorsed]: Filed May 1, 1947. (84)

(37) 5-9-1947: Motion for New Trial was filed in the Court at Yakima, Washington, by Continental Casualty Company. Copy of said Motion as recorded on pages 115 and 116 of Transcript of Record in said suit follows:

[Title of District Court and Cause]

MOTION FOR NEW TRIAL

Comes now, Continental Casualty Company, a corporation, one of the defendants in the above-

entitled cause, and moves the Court for an order vacating and setting aside the judgment in the above-entitled action and awarding a new trial for the following reasons:

1.

That judgment was not sustained by substantial evidence.

2.

That judgment was contrary to law.

3.

The Court erred in finding that any sum in excess of $2,656.46 was owing by this defendant, Continental Casualty Company, a corporation, to the plaintiff.

4.

The Court erred in finding as a fact that the law of the State of Washington applied and that the Federal rule as to damages did not apply.

5.

That the Court erred in entering judgment against the defendant, Continental Casualty Company, for any sum in excess of $2,656.46. (85)

6.

That said motion is further based upon all the files and records in said cause.

Dated this 8th day of May, 1947.

EUGENE D. IVY,
Attorney for Defendant,
Continental Casualty Co.

[Endorsed]: Filed May 9, 1947. (86)

(38) 5-20-1947: Order denying motion for new trial filed in the Court at Yakima, Washington, copy of said order as recorded on page 117 of Transcript of Record in said suit follows:

ORDER DENYING MOTIONS FOR NEW TRIAL

The above-entitled cause having come on regularly for argument on the 20th day of May, 1947, upon the motion of A. J. Goerig and Clyde Philp and upon the motion of Continental Casualty Company, a corporation, for a new trial in the above-entitled matter, the Continental Casualty Company appearing by and through its attorney Eugene D. Ivy, and the defendants, A. J. Goerig and Clyde Philp appearing by and through their attorneys, Brown & Hawkins, and the use plaintiff appearing by and through his attorney, Harry L. Olson, and the Court having duly considered said motions and argument of counsel and being fully advised in the premises,

It Is Hereby Ordered That the motion of A. J. Goerig and Clyde Philp for a new trial and the motion of the Continental Casualty Company for a new trial, and each of them, be and the same are hereby denied.

Done in open court this 20th day of May, 1947.

/s/ SAM M. DRIVER,
Judge.

Presented by:

/s/ HARRY L. OLSON,
Of Attorneys for Plaintiff.

[Endorsed]: Filed May 20, 1947. (87)

Plaintiff herein can not find any reference whatever in the Transcript of Record in the above-mentioned cause wherein the Defendants A. J. Goerig and Clyde Philp or the Macris had filed a motion for a new trial.

(39) 5-20-1947: Date Continental Casualty Company filed Notice of Appeal. (Transcript, 118.)

(40) 7-29-1947: Date A. J. Goerig & Clyde Philp filed Notice of Appeal. (Transcript, 129.)

(41) 8-18-1947: Date Sam, Don and Joe Macri filed Notice of Appeal. (Transcript, 136.)

(42) 5-26-1947: Date Continental Casualty Company filed Supersedeas appeal bond in the sum of $65,000.00. (Transcript, 119.)

(43) Plaintiff herein filed a motion to dismiss appeal of Cross-Appellants Macri, a copy of said motion follows:

In the United States Circuit Court of Appeals
for the Ninth District
No. 11707

CONTINENTAL CASUALTY COMPANY, a Corporation,

Defendant and Appellant,

vs.

THE UNITED STATES OF AMERICA, for the Use of M. C. SCHAEFER, an Individual Doing Business as CONCRETE CONSTRUCTION COMPANY,

Plaintiff and Appellee,

A. J. GOERIG and CLYDE PHILP, Individuals and Co-partners,

Defendants and Cross-Appellants,

SAM MACRI, DON MACRI and JOE MACRI, Individuals and Co-Partners,

Defendants and Cross-Appellants.

MOTION TO DISMISS APPEAL OF CROSS-APPELLANTS MACRI

Comes now the Appellee, M. C. Schaefer, an individual, doing business as Concrete Construction Company, and moves the above-entitled Court for the following order:

1.

That an order be entered, dismissing the appeal of the Defendants and Cross-Appellants, Sam Macri, Don Macri and Joe Macri, individuals and co-partners; this motion to dismiss is made upon the grounds and for the reason that said Defendants and Cross-Appellants failed to serve and file their notice of appeal timely, as required by 18 U.S.C.A., Section 230, and is based upon the transcript of the record, heretofore filed in this Court, and upon the affidavit of Harry L. Olson, hereto attached and made a part of this motion.

2.

The facts, objects and points, concerning this motion to dismiss, are as follows: That upon the 1st day of May, 1947, Findings of Fact, Conclusions

of Law and Judgment were entered in said case, and no motion for a new trial was ever made, for or on behalf of the said Defendants and Cross-Appellants Macri; that on the 9th day of May, 1947, Defendant and Appellant, Continental Casualty Company, interposed a motion for a new trial; that on the 12th day of May, 1947, Defendant and Cross-Appellants, A. J. Goerig and Clyde Philp, interposed a motion for a new trial; that thereafter, on the 20th day of May, 1947, an order denying both of the above motions for a new trial was entered by the District Court; that upon the 16th day of August, 1947, the Defendants and Cross-Appellants Macri served and filed their notice of appeal to the above-entitled Court. That said notice of appeal was served and filed 110 days after the entry of said Judgment, and that Appellants Macri, not having interposed a motion for a new trial, it is the position of the Appellee herein, that the time for appeal, as for the Cross-Appellants Macri, began to run upon the entry of the Judgment, and was not suspended by the motions for a new trial, interposed by the other Defendants herein.

3.

An authority for the position of the Appellee that the notice of appeal of the Cross-Appellants Macri was not timely, Appellee cites the following authorities: Denholm and McKay Company vs. Collector of Internal Revenue, 132 Fed. (2D) 243; Alexander vs. Special School District of Boonville, 132 Fed. (2D) 355; Tinkoff vs. West Publishing

Company, 138 Fed. (2D) 607; Bowles vs. Rice, 152 Fed. (2D) 543; Morrow vs. Wood, 126 Fed. (2D) 1021; Safeway Stores, Inc., vs. Coe, 136 Fed (2D) 771; 26 U.S.C.A. 230.

Dated this .... day of December, 1947.

HARRY L. OLSON,

FRED C. PALMER,
Attorneys for Appellee,
M. C. Schaefer.

AFFIDAVIT OF HARRY L. OLSON

State of Washington,
County of Yakima—ss.

Harry L. Olson, being first duly sworn, on oath deposes and states:

That he is one of the attorneys for Appellee, M. C. Schaefer, doing business as Concrete Construction Company, and makes this affidavit in support of the motion to dismiss the appeal of Defendants and Cross-Appellants, Sam Macri, Don Macri and Joe Macri, individuals and co-partners; that the Judgment, Findings of Fact and Conclusions of Law in the above-entitled case were signed by the Court and entered upon May 1st, 1947; that no motion for a new trial was ever made for or on behalf of the Defendants and Cross-Appellants Macri; that the Continental Casualty Company served and filed a motion for a new trial upon the 9th day of May, 1947; that A. J. Goerig and Clyde Philp served and filed a motion for a new trial on May 12th, 1947; that the District Court signed and

entered an order denying said motions for a new trial, interposed by the Appellants, Continental Casualty Company, and Cross-Appellants, A. J. Goerig and Clyde Philp, on May 20th, 1947; that the Cross-Appellants Macri served and filed their notice of appeal to the Circuit Court of Appeals on August 16th, 1947.

HARRY L. OLSON.

Subscribed and Sworn to before me this .... day of January, 1948.

.....,
Notary Public for Washington, Residing at Yakima.

(44) 3-31-1948: Date opinion upon motion to dismiss appeal of Macri, et al., was filed. Copy of said Opinion follows:

In the United States Circuit Court of Appeals
for the Ninth Circuit
No. 11,707

CONTINENTAL CASUALTY COMPANY, a Corporation,
Defendant and Appellant,

vs.

THE UNITED STATES OF AMERICA, for the Use of M. C. SCHAEFER, an Individual Doing Business as CONCRETE CONSTRUCTION COMPANY,
Plaintiff and Appellee,

A. J. GOERIG and CLYDE PHILP, Individuals and Co-Partners,

Defendants and Cross-Appellants.

SAM MACRI, DON MACRI and JOE MACRI, Individuals and Co-Partners,

Defendants and Cross-Appellants.

March 31, 1948

Upon Appeals from the District Court of the United States for the Eastern District of Washington, Southern Division

Upon motion to dismiss appeal of Macri, et al.

Before: Denman, Healy and Bone,
Circuit Judges.

Denman, Circuit Judge:

The United States, as use plaintiff for one Schaefer, sued Sam Macri, Don Macri, Joe Macri, A. J. Goerig, and Clyde Philp, individuals and co-partners doing business as Macri Company, and Continental Casualty Company, a corporation, upon a claimed non-performance of contract between the United States and Defendants Macri Company for earthwork, pipelines and structures, laterals 59.3 to 69.8 and sublaterals Roza Division, Yakima Project, Washington, wherein and whereby said defendant contractors contracted to furnish materials and perform work in accordance with the

terms of said contract for the sum of $128,550.95. The Continental Casualty Company was joined as surety for the Macri Company's performance of the contract. Judgment on this contract was entered against the three Macris and the Continental Casualty Company jointly and against each of them.

The complaint also alleged non-performance of a subcontract of the Macris' Company on the same job. Judgment was entered against them alone on this count. The complaint against the other two partners was dismissed.

The Continental Casualty Company claimed against the three Macris on their contract to hold it harmless on its surety bond. Judgment was entered against the Macris for the amount the Continental Casualty Company was held liable to the plaintiff and for its attorneys' fees. This judgment was not made conditional on the non-payment of the judgment by the Macris.

The three Macris also cross-complained against the plaintiff. Judgment was entered dismissing the cross-complaint. The three Macris also cross-complained against Goerig and Philp. Judgment was entered dismissing this cross-complaint. Goerig and Philp cross-complained against the three Macris. Judgment was entered dismissing this complaint. All the judgments were entered on May 1, 1947.

The Continental Casualty Company and Goerig and Philp moved for a new trial. The three Macris did not join in the motion. The motions for a new trial were denied on May 20, 1947. The Continental Casualty Company and Goerig and Philp appealed

within three months after May 1, 1947. The Macris delayed their appeal until August 18, 1947, more than three months after the entry of the judgments against them, but within three months after the denials of the motions for new trial, in which they did not join.

Schaefer, for whom the United States sues, but not the United States the use plaintiff, moves to dismiss the Macris' appeal on the ground of absence of jurisdiction. There is no motion on behalf of the others having judgment. However, since the question is one of jurisdiction, we must proceed to consider it, even though there may be no moving party.

As to the judgments against the three Macris on their cross-complaints, it is apparent their appeal must be dismissed. They made no motion for a new trial as to these judgments, and that of Goerig and Philp was of adversary parties and could not be construed as on behalf of the Macris. So also of the judgment for the United States on the second count against the Macris alone. The statute was not tolled as to it.

The joint and several judgment on the count in favor of the United States and against the Macris and their surety and that in favor of the Continental Casualty Company against the Macris on their agreement to hold it harmless present a different question. It is contended that since there might have been a granting of the motion for a new trial in favor of the Continental Casualty Company, the Macris' surety, which would dispose

of the same issue as that decided against the judgment debtors Macris, co-jointly and with their surety, the pendency of the motions for a new trial by one of such debtors tolled the time for appeal as to all of them.

The Macris cite Brockett, et al., vs. Brockett, 2 Howard 238, 240, the leading case of the judge-made law that the pendency of a motion to modify a decree or for a new trial tolls the statutory time for appeal.* However, the opinion there states that the petition to have opened the decree, the consideration of which tolled the statute, was by the losing "defendants" (plural). The title of the case, with Brockett, et al., as appellants, as well shows the petition was not by one of them appealing alone.

More relevant is Zimmerman vs. United States, 298 U.S. 167, where the judge sua sponte, extended the time to do all things connected with the decree because "it will be necessary to modify and amend the said decree." There the Suprme Court reasoned that since none of the defendants decreed against could know how the amendment would affect him, the statute was tolled as to all. Cf. Leishman vs. Associated Electric Co., 318 U.S. 203, 205.

It is apparent that if the motion for the new trial were granted to the surety of the Macris, it would be on grounds that in justice would require a similar relief for the Macris against the judg-

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*Now embodied in F.R.C.P. 73(a) effective March 19, 1948.

ment on the first count in favor of the United States and also that against them and in favor of the surety. If the trial court on the motion of the surety had the power to set aside these two judgments, the Macris could not know until the surety's motion were decided whether the judgments were final as to them. That is to say, they would be in the situation of the parties in the Zimmerman case.

The question, then, is could the trial court under Rule 59(a) of the Federal Rules of Civil Procedure have granted a new trial to the Macris on their judgment on the motion of their surety. As to judge-tried cases, Rule 59(a) provides:

> "(a) Grounds. A new trial may be granted to all or any of the parties and on all or part of the issues. * * * (2) in an action tried without a jury, for any of the reasons for which rehearings have heretofore been granted in suits in equity in the courts of the United States. On a motion for a new trial in an action tried without a jury, the court may open the judgment if one has been entered, take additional testimony, amend findings of fact and conclusions of law or make new findings and conclusions, and direct the entry of a new judgment."

It is not a strained interpretation of the language of the first sentence of the rule that a motion of a surety to "open," that is, set aside, a joint and several judgment against it and its three principals empowers the court to set it aside as to all four of

them. We have held that those rules must be liberally construed. Phillips vs. Baker 121 Fed. (2d) 752, 754; Pierkowskie vs. New York Life Ins. Co., 147 Fed. (2d) 928, 933 (C.C.A. 3); Fakouri vs. Cadais, 147 Fed. (2d) 667, 669.

An analogy to such an interpretation of power in the district court is the power of the appellate court on an appeal taken by but one party on an issue which, if resolved in his favor, will likewise affect another party, to reverse the judgment as to such non-appealing party. In re Barnett, 124 Fed. 1005, 1009 and state cases cited: Maryland Casualty Co. vs. City of South Norfolk, 54 Fed. (2d) 1032, 1039; c.f. Washington Gas Light Co. vs. Lansden 172 U.S. 534, 555.

Since it is our view that the motion for a new trial by their surety tolled the statute for the Macris, on their appeals from the judgment on the first count of the complaint of the United States and the judgment in favor of Continental Casualty Company, we hold they conferred jurisdiction here. As to the other appeals of the Macris, we order entered a judgment of dismissal as to them.

[Endorsed]: Opinion upon motion to dismiss appeal of Macri, et al. Filed Mar. 31, 1948. Paul P. O'Brien, Clerk.

(45) 10-19-1948: Date the appeals were argued in the United States Court of Appeals for the Ninth Circuit.

(46) 2-11-1949: Date the United States Court of

Appeals for the Ninth Circuit affirmed the judgment of the said District Court.

(47) 4-5-1949: Date the United States Court of Appeals for the Ninth Circuit denied the petitions for rehearing that had been filed by Continental Casualty Company on March 7, 1949, and the petition of Macri, et al., filed March 10, 1949. Copy of the proceedings had in the United States Court of Appeals for the Ninth Circuit follows:

CONTINENTAL CASUALTY COMPANY, a Corporation,

vs.

M. C. SCHAEFER, etc., et al.

United States Court of Appeals
for the Ninth Circuit

Excerpt from Proceedings of Tuesday, October 19, 1948.

Before: Denman, Chief Judge, and Healy and Bone, Circuit Judges.

ORDER OF SUBMISSION

Ordered appeals herein argued by Mr. Elwood Hutcheson, counsel for appellant, Continental Casualty Company, and by Mr. Tom W. Holman, counsel for appellants, Macri, et al., and by Messrs. Stuart W. Hill and Harry L. Olson, counsel for appellee, Schaefer, and submitted to the court for consideration and decision.

United States Court of Appeals
for the Ninth Circuit

Excerpt from Proceedings of Friday, February 11, 1949.

Before: Denman, Chief Judge; Bone and Orr, Circuit Judges.

ORDER DIRECTING FILING OF OPINION AND FILING AND RECORDING OF JUDGMENT

Ordered that the typewritten opinion this day rendered by this court in above cause be forthwith filed by the clerk, and that a judgment be filed and recorded in the minutes of this court in accordance with the opinion rendered.

In the United States Court of Appeals
for the Ninth Circuit

[Title of Cause.]

Appeals from the District Court of the United States for the Eastern District of Washington Southern Division

Before: Denman, Chief Judge; Healy and Bone, Circuit Judges.

Denman, Chief Judge:

OPINION

The several Macris, hereafter so called, contractors on a government contract under the Miller Act,

appeal from a judgment in favor of Schaefer, their sub-contractor, for labor and materials furnished in the performance of a subcontract and modification thereof.

Continental Casualty Company, hereafter called Continental, appeals from a judgment against it as surety on the contract between the Macris and the United States, described infra, in favor of Schaefer for the amount of the judgment against the Macris.

The Macris do not contend that they are not liable for an unpaid balance on the contract price included in the judgment, but contend they are not liable for more than the contract price. They contend that the evidence does not support the court's findings that they breached the subcontract and, on the contrary, that the extra work done by Schaefer was in the performance of that contract. Continental's appeal urges these grounds and, in addition, that in any event a surety under the Miller Act is not liable for more than the value of the labor and materials to be supplied under the contract. Continental also seeks to recover here additional attorney's fees for prosecuting this appeal. The dispute between Schaefer and the Macris arises out of the performance of a subcontract to do the cement work on the federal irrigation project known as the Roza Division, Yakima Project, near Yakima, Washington. Schaefer sued to recover $57,618.87 as the alleged unpaid balance of the reasonable value of the work, labor and expenses on a quantum meruit theory after the alleged breach of a contract by the

Macris. The subcontract between Schaefer and the Macris provided that Schaefer was to furnish all labor and necessary equipment to do all of the concrete work, form work, cut, bend and install all reinforcing steel, all such work as shown on the plans as specified (in certain numbered specifications).

The trial court, sitting without jury, found that the Macris were to perform all of the excavating and to furnish all of the materials necessary for the performance of the subcontract with the exception of form wire, nails and curing materials. The excavating and materials were to be furnished in accordance with specifications and in proper time for the performance of the subcontract by Schaefer. The court further found that Schaefer's performance was diligent, but that the Macris had breached the subcontract in that they failed to make the excavations in the proper manner so that Schaefer's carpenters had to make extra excavations in order to install the forms. The Macris also failed to do the fine grading in the proper manner and in time for Schaefer to proceed with prompt progress of the work. The Macris also failed to furnish the proper quality and quantity of lumber required, which hindered and delayed Schaefer in the performance of his work. Macris' breaches were found willful and negligent and they continued and persisted throughout the entire performance of the subcontract.

The court further found that Schaefer had made many complaints to the Macris regarding the latter's defaults; that the Macris induced Schaefer to con-

tinue performance and to perform some of the work the Macris were to do, and that Schaefer would be compensated for the additional expense because of the adverse conditions created by the Macris. The court found that "there was an implied agreement or quasi-contract that * * * Schaefer was to be paid the fair and reasonable value of his subcontract under the conditions and with the extra burdens imposed upon (Schaefer by the Macris' breaches)."

The subcontract contained a provision that in order to obtain extra compensation, written notices and statements were required. The court found that the Macris had waived this provision by their conduct toward Shaefer by accepting and acting upon the oral notices given.

Judgment was rendered in favor of Schaefer against the Macris and Continental for $56,764.97, with interest from date of judgment. Also, a judgment in that same amount was rendered in favor of Continental against the Macris, plus $1750 for Continental's attorneys' fees. Continental and the Macris both appeal from the judgments, and Continental asks for additional attorneys' fees from the Macris to cover the prosecution of this appeal.

A. The law governing the several issues.

On the issue of the Macris' liability to Schaefer, we think that the Washington law should govern. While federal jurisdiction is conferred by the Miller Act and not by diversity of citizenship, we feel

that the reasons underlying the doctrine of Erie Ry. Co. v. Tomkins, 304 U. S. 64, are applicable here, where the issue does not involve construction or application of a federal statute. Blair v. United States, 147 F. 2d 840, 849 (Cir. 8). Cf. Goerig v. Continental Casualty Co., 167 F. 2d 930 (Cir. 9). The rights and liabilities of the parties under the subcontract should not depend on the choice of forum sought to enforce these rights. Cf. Guaranty Trust Co. v. York, 326 U. S. 99, 109. Hence we should decide this issue as would a state court sitting in Washington. Since all the relevant facts regarding this subcontract have occurred in Washington, the Washington substantive law of contracts is applicable. Hatcher v. Idaho Gold and Ruby Mining Co., 106 Wash. 108, 113, 179 P. 106.

On the issue of Continental's liability on the payment bond, the federal law should control because the determination of the extent of the liability involves the construction of a federal statute, the Miller Act, under which it was created Liebman v. United States, 153 F. 2d 350 (Cir. 9).

B. Macris' Liability to Schaefer.

The district court held that there was an "implied agreement or quasi-contract" to the effect that the Macris would pay Schaefer the fair and reasonable value of his subcontract under the conditions and with the extra burdens imposed upon Schaefer by the Macris' breach and failure to perform their part of the subcontract. The Macris claim there

is no substantial evidence to support the finding that they breached the subcontract. While the testimony is conflicting, the record contains sufficient evidence to support the finding, and this court will not weigh the evidence in such a case. F.R.C.P. Rule 52 (a). We cannot say that this finding is clearly erroneous.

Since the court found that the subcontract was willfully breached by the Macris and that they induced Schaefer to continue performance and even to perform part of the Macris' work, Schaefer should be allowed to recover in excess of the stipulated contract price for the extra work performed in reliance on the Macris' statements which were intended to induce reliance. Olwell v. Nye and Nisson Co., 26 Wash. 2d 282. Whether the theory is called implied-in-fact contract, quasi-contract or promissory estoppel, the measure of Schaefer's recovery against the Macris should be the reasonable value of the work and materials furnished plus overhead and profit. Nelson v. City of Seattle, 180 Wash. 1, 28, 38 P. 2d 1034. Cf. United States v. Zara Contracting Co., 146 F. 2d 606 (Cir. 2); 5 Williston, Contracts (Rev. Ed.) §1480.

The Macris contend that Schaefer may not recover for the extra work because he has not complied with the contract provisions regarding written notice of changes in order to get extra compensation. The trial court found that the Macris had waived these provisions by accepting and acting on the oral notices, and there is ample evidence to support such a finding. Such a provision does not

deprive the parties of the power to modify the contract without a writing, Richie v. State, 39 Wash. 95, 81 P. 79.

The Macris rely on City and County of San Francisco v. Transbay Construction Co., 134 F. 2d 468 (Cir. 9). That case is not applicable here because it was a diversity case in which this court expressly applied California law to determine the rights of the parties under the contract. Furthermore, that case is distinguishable in that the nature of the claim, although on the theory of quantum meruit, was really for damages for delay, and the plaintiff there had failed to comply with provisions of the City's charter relating to filing such claims within sixty days. Also, there the alleged extra work done was that which the plaintiff contracted to do, but it had become more burdensome due to unanticipated conditions. The City had held out no added inducement to the contractor to continue performance, and did not, by implication or otherwise, agree to pay the contractor anything beyond the amount fixed in the written agreement. In the instant case, no statute limits the Macris liability for breaches of the subcontract, and also Schaefer has performed work at the Macris' request which was not called for by the subcontract. We hold the Macris liable for the extra work performed at their request.

C. Method of Ascertaining the Amount of Recovery.

Macris contend that Schaefer should not recover because he has failed to prove the increased cost

of the work because of Macris' defaults. Schaefer introduced a statement of costs prepared by a certified public accountant which showed all Schaefer's costs on this project. From this amount was subtracted the amount the Macris had paid on account and judgment was rendered for the difference. There was evidence to show what Schaefer's costs would have been if the work had progressed as originally contemplated, and this amount was substantially the same as the amount of Schaefer's bid, so the increased costs of Schaefer were properly computed by reference to this statement. In the light of this evidence we cannot say that the finding of the trial court was erroneous. The judgment in favor of Schaefer against the Macris is affirmed.

D. Continental's Liability to Schaefer.

Section 1 of the Miller Act, 40 U.S.C. §270 (a), provides that the contractor with the government shall furnish "a payment bond * * * for the protection of all persons supplying labor and material in the prosecution of work provided for in said contract for the use of each such person." Section 2, 40 U.S.C. §270 (b), provides that "every person who has furnished labor or material in the prosecution of the work provided for in such contract, in respect of which a payment bond is furnished under section 270a of this title and who has not been paid in full therefore * * * shall have the right to sue on such payment bond for the amount, or the balance thereof, unpaid at the time of institution of such suit * * *."

Continental contends that Schaefer's cause of action is for damages for breach of the subcontract by the Macris, and that a surety under the Miller Act is not liable for such damages. United States v. Maryland Casualty Co., 147 F. 2d 423 (Cir. 5); L. P. Friestedt Co. v. United States Fire Proofing Co., 125 F. 2d 1010 (Cir. 10). These cases are distinguishable from the instant case in that there was no agreement there by the general contractor or the United States to pay any additional amount for the extra work done. Here the court below found, "That pursuant to said subcontract * * * and pursuant to the oral conversations, representations and inducements herein referred to, (Schaefer) between the 14th day of March, 1944, and the first day of May, 1945, furnished labor and materials and performed services for the (Macris) at their special instance and request of the reasonable cost and value of $89,498.71." From this amount was deducted the amount the Macris paid on account, which left a balance of $56,764.97, the amount of the judgment. It does not appear from this finding that the amount of the judgment included damages for breach of contract.

In the Friestedt case, supra, at page 1012, the court said, "There is here no claim that they (the subcontractors) furnished any extras necessary for the completion of the contract and therefore contemplated by the parties and implied in the contract * * * What was done was not required by any of the terms of the contract but became necessary because of an alleged breach of the contract because

a contractor violated one of the terms of the contract; * * *'' Here the new agreement between the Macris and Schaefer contemplated that Schaefer was to perform extra work, which the Macris were originally obligated to perform, in order that the main contract between the Macris and the United States could be performed. The performance of the new agreement furnished labor and materials agreed by the Macris to be supplied under the main contract and hence labor and materials within the terms of the Miller Act and the bond. Cf. John A. Johnson & Sons v. United States, 153 F. 2d 534 (Cir. 4). The judgment against Continental is affirmed.

E. Attorneys' fees for Continental's Appeal.

The trial court awarded Continental $1750 for attorneys' fees in that court. Continental now seeks to recover in this court fees for the prosecution of this appeal, pursuant to a provision in the application for the bond which required the Macris ''to indemnify the company (Continental) against all loss, costs, damages, expenses and attorneys' fees whatever, and any and all kind of liability therefor, sustained or incurred by the company * * * in prosecuting or defending any action brought in connection (with the bond.)'' There is also a provision ''that separate suits may be brought hereunder as causes of action accrue'' without prejudice to other suits regardless of when the cause of action arises.

No cause of action had accrued for the attorneys'

services in this court when the case was pending in the district court. Whatever right the parties may have for this more recent cause of action should be instituted in a court of first instance. It is an original proceeding which cannot be initiated here.

In the three cases cited by Continental: American Can Co. v. Lodoga Canning Co., 44 F. 2d 763 (Cir. 7); Davis v. Parrington, 281 Fed. 10 (Cir. 9) and Rigopoulous v. Kervan, 140 F. 2d 506 (Cir. 2), the statutes involved created in the appellate court the right there to recover attorneys' fees.

The judgment of Schaefer against the Macris and Continental is affirmed. The petition for allowance of attorneys' fees is dismissed, without prejudice.

[Endorsed]: Opinion. Filed Feb. 11, 1949. Paul P. O'Brien, Clerk.

United States Court of Appeals
for the Ninth Circuit
No. 11707

CONTINENTAL CASUALTY COMPANY

vs.

M. C. SCHAEFER, etc.

A. J. GOERIG and CLYDE PHILP

vs.

CONTINENTAL CASUALTY COMPANY.

SAM MACRI, et al.,

vs.

M. C. SCHAEFER, etc.

JUDGMENT

Upon Appeal from the District Court of the United States for the Eastern District of Washington, Southern Division.

This cause came on to be heard on the Transcript of the Record from the District Court of the United States for the Eastern District of Washington, Southern Division, and on petition of Continental Casualty Company for allowance of attorneys' fees on the appeal and was duly submitted.

On Consideration Whereof, it is now here ordered and adjudged by the Court that the judgment of the said District Court in this cause be, and hereby is affirmed, and that the petition of Continental Casualty Company for allowance of attorneys' fees on the appeal be, and hereby is denied.

[Endorsed]: Filed and entered Feb. 11, 1949. Paul P. O'Brien, Clerk.

United States Court of Appeals
for the Ninth Circuit

Excerpt from Proceedings of Tuesday, April 5, 1949.

Before: Denman, Chief Judge; Healy and Bone, Circuit Judges.

ORDER DENYING PETITIONS FOR REHEARING

Upon consideration thereof, and by direction of the Court, It Is Ordered that the petition of appel-

lant, Continental Casualty Co., filed March 7, 1949, and the petition of appellants, Macri, et al., filed March 10, 1949, both within time allowed therefor by rule of court, for a rehearing of above cause be, and each of them hereby is denied.

United States Court of Appeals
for the Ninth Circuit

CERTIFICATE OF CLERK, U. S. COURT OF APPEALS FOR THE NINTH CIRCUIT, TO RECORD CERTIFIED UNDER RULE 38 OF THE REVISED RULES OF THE SUPREME COURT OF THE UNITED STATES

I, Paul P. O'Brien, as Clerk of the United States Court of Appeals for the Ninth Circuit, do hereby certify the foregoing six volumes, containing two thousand two hundred and seventy-five (2,275) pages, numbered from and including 1 to and including 2,275, to be a full, true and correct copy of the entire record together with original documentary exhibits transmitted herewith of the above-entitled case in the said Circuit Court of Appeals, made pursuant to request of counsel for the appellant, Continental Casualty Co., and the appellants, Macri, et al., and certified under Rule 38 of the Revised Rules of the Supreme Court of the United States, as the originals thereof remain on file and appear of record in my office.

Attest my hand and the seal of the said the United

States Court of Appeals for the Ninth Circuit, at the City of San Francisco, in the State of California, this 25th day of April, 1949.

[Seal] PAUL P. O'BRIEN,
Clerk.

(48) 4-5-1949: Date of the Order Staying Issuance of Mandate was endorsed and filed in the United States Circuit Court of Appeals for the Ninth Circuit. Copy of same follows.

United States Circuit Court of Appeals
for the Ninth Circuit
No. 11707

CONTINENTAL CASUALTY COMPANY,

Appellant,

vs.

M. C. SCHAEFER, etc.,

Appellee.

ORDER STAYING ISSUANCE
OF MANDATE

Upon application of Elwood Hutcheson, Esq., counsel for the appellant, and good cause therefor appearing, It Is Ordered that the issuance, under Rule 28 of the mandate of this Court in the above cause be, and hereby is stayed, pending the filing, consideration and disposition by the Supreme Court of the United States of a petition for writ of certiorari to be made by the appellant herein, providing such petition is filed in the clerk's office of the

Supreme Court of the United States on or before May 16, 1949. In the event the petition for writ of certiorari is granted, then this stay is to continue pending the final disposition of the case by the Supreme Court of the United States.

WILLIAM DENMAN,
United States Circuit Judge.

Dated San Francisco, Calif., April 5, 1949.

[Endorsed]: Filed April 5, 1949. Paul P. O'Brien, Clerk.

(49) 5-14-1949: Continental Casualty Company filed their petition for writ of certiorari in the Supreme Court of the United States.

(50) 6-20-1949: Continental Casualty Company's petition for writ of certiorari denied.

(51) 6-20-1949: Macris filed petition for writ of certiorari in the Supreme Court of the United States.

(52) Continental Casualty Company filed their petition for rehearing on the order denying their petition for certiorari.

(53) 10-10-1949: Continental Casualty Company's petition for rehearing on the order denying their petition for certiorari was denied.

(54) 10-10-1949: Macri's petition for writ of certiorari denied.

(55) 11-4-1949: Plaintiff accepted Continental Casualty Company's draft in payment of the judg-

ment on job specification No. 1062, but only after two hours and ten minutes of argument before the attorneys for the Continental Casualty Company deleted three words on the back of said draft. The following is a copy of the statement on the back of said draft as first presented to plaintiff and the three words shown underscored are the words x'd out before said draft was accepted by plaintiff: "Received of Continental Casualty Company the sum of $66,306.48 in full payment and satisfaction of judgment, interest, costs, etc., in cause entitled United States of America for the use of M. C. Schaefer, an individual, doing business as Concrete Construction Company, vs. Sam Macri, Don Macri and Joe Macri, co-partners, doing business as Macri Company, and Continental Casualty Company, a corporation, being Civil Case No. 246, United States District Court for the Eastern District of Washington, Southern Division." The above three underlined words were used in furtherance of defendants' concerted plan and would have deprived plaintiff of his rights to maintain this suit.

(56) 11-9-1949: Date the draft issued by Continental Casualty Company was finally paid.

(57) 1-6-1950: Phone conversation had by Stewart W. Hill and plaintiff at plaintiff's office with Harry L. Olson at Olson's office in Yakima, Washington, in regard to getting damage suit ready to file.

(58) 1-7-1950: On this date plaintiff and his

Portland attorney, Stewart W. Hill, checked many of the details of this suit and Mr. Hill agreed to have a tentative draft of the complaint with sustaining points of law ready by the time plaintiff returned from his vacation on or about the 15th day of March, 1950. At that time plaintiff and his attorney, Harry L. Olson, and Mr. Hill would meet and prepare the final draft of the complaint to be filed.

(59) 8-8-1950: Olson's letter to Brethorst, Holman, Fowler & Dewar. Copy of said letter follows:

August 8, 1950.

Brethorst, Holman, Fowler & Dewar,
Attorneys at Law,
17th Floor, Hoge Building,
Seattle 4, Washington.

Gentlemen:

Attention: A. T. Bateman.
Re: Schaefer v. Macri, et al.

I have your letter of August third enclosing original and copy of proposed order in connection with the Macri's cost bond and I am unable to approve the same for two reasons:

First: I at one time examined the bonds filed in connection with the appeal and I recall that at least one of the bonds was conditioned upon payment of any damages caused by any delay resulting from the appeal. Mr. Schaefer asserts that these damages are substantial and contemplated instituting suit for the same.

In the second place, when the Continental Casualty Company paid the judgment in connection with this case they took an assignment of the judgment to them and when I called Mr. Hutcheson, who represents the Bonding Company, he was also opposed to my approving the order.

Yours truly,

HARRY L. OLSON.

HLO:re

(60) Even after conclusion of said litigation and payment to Plaintiff, Defendant McKelvy still attempted to deprive Plaintiff of his right to be heard on Plaintiffs allegation of damages from conspiracy by trying to get Plaintiff to pay for alleged "services" rendered by McKelvy between 11-1-1944, and 10-20-1945, and thus bar such action. Thus, on 8-16-1950, McKelvy came to Plaintiff's office in Portland, Oregon, and the following is a copy of the memorandum of the conversation on that date:

Conversation with Mr. McKelvy August 16, 1950
From 1:30 to Approx. 2:35 P.M.

After saying hello to one another, he asked: "How is business?" I said: "Nothing to brag about." He said: "I thought it would be good." I said: "No, you see, we are still in the concrete subcontracting game instead of doing general contract work because of the lack of money due to the heavy expense of the suit, and aside of that, we are not able to make bond on any work." Mr. McKelvy said: "This statement came up and I told the girl

at the office that I would take it along and see what I could do with it." I asked him into a rear office, and then told him that I was not thinking about it at present, and that I was going to start a damage suit to find out whether or not a bonding company and others could give us such a run-around. He then said: "Well, I don't see where that affects this account. Now if it is too much, why you set the amount and let's get it cleaned up. In any event we will not sue you as the statute of litimations has run on it." I then said: "As far as an account being outlawed by time doesn't make any difference to me. If an account is just, I will pay it anyway, regardless of the time." He said: "Well, I would, too, and on this I think we earned it. Apparently you don't think so." I said: "Well, I want to see what the score really is. I've gotten the run-around for a long time and I would like to find out why I was led right up to the brink where I only had about a month left to file our suit, and at that time at that meeting at your office I was pushing you to get the suit filed, then you said—'We can't represent you in a suit against Continental Casualty Co. as Continental Casualty Company is one of our largest accounts.' I then asked you how much time I yet had before the deadline, and you said—'About a month.'" Mr. McKelvy then said: "We did not know before that time that Continental Casualty Company would be involved in a suit or we would not have taken your account. If it were the money we were after and thought Continental Casualty Company would become involved,

we would not have taken your case in the first place. As it was, they asked us to represent them, but we turned them down." I then said: "Now, that would have been nice if you would have agreed to represent them after having represented me, wouldn't it?" McKelvy then said: "I don't like your implying that we are crooked. We have been in business and had a good reputation since before the turn of the century." I said: "I didn't make that statement. I am just relating what has happened that I don't like. Now, wouldn't it have been much better if you had informed me the first time that I was in your office that you couldn't represent me as Continental Casualty Company was one of your largest accounts instead of leading me right up to the brink where, if I had not been on my toes, I would have lost my right to sue." McKelvy said: "Yes, but our hindsight is now much better than our foresight and we did not believe that Continental Casualty Company would be involved." I said: "Nevertheless, they were Macri's Bonding Company and you knew it." And then I also said: "Then you remember the time you told me as you and I were walking up the street that I couldn't collect from Macri as he had all his assets hidden, that the chances of holding Continental were very slim, and told me to turn my business and anything of value over to brother Bill, a brother-in-law or someone I could trust and thereby get rid of the account with Uncle Sam and all other old accounts. And how you handled an account for a local contractor and the Bank in

that case lost approximately $83,000.00 and you got their release on it and that the contractor is still doing business. I told you then that my road was a straight road, probably long and rough as hell, and that's the only road I'm traveling and if it busts me up that is still the way it's going to be done. You remember that, do you?'' Mr. McKelvy said: ''Yes, I do.'' I said: ''And how when you showed me young Macri's picture and told me that—'This is just a coverup of Macri's assets. Everyone knows the kid didn't do it, but he has had his day in court and that's a closed book.' You remember that, don't you?'' Mr. McKelvy said: ''Yes, I do.'' I said: ''Then after they had Macri's assets hidden, they came up with a termination agreement to protect Philp & Goerig, and that damn thing is predated ahead of our pouring concrete or dated the middle of July. Now isn't that something?'' McKelvy said: ''I think you may have that about right.'' I said: ''I just want to find out if a bonding company can do this on two different jobs. First, on a job where the General Contractor goes broke before the job is completed, the bonding company takes over, submits statements to the school board, as an example, receives payment on same, receives statements from subcontractors and material companies and pays them. In this way they are filling the shoes of the General Contractor where the public is concerned or the public officials are concerned or they would soon be out of business. But take the second job where the general contractor completes the job there is no general

public concerned and they just tell the subcontractors and material men to go to hell or in effect just as much. Then we have to spend $40,000.00 to $50,000.00 to collect $57,000.00 plus interest from date of judgment. I am getting suit ready now." McKelvy said: "That will take another 10 to 15 years." I said: "I don't care. I'll still have six years left. I owe it to my conscience, my men, and to other sub-contractors to clear such a situation up." Then I said: "And what about the meeting that I had with you at your office at about 11:30 a.m. and we only greeted one another and had a few words but did not get into our subject, when you told me that you had a luncheon speaking engagement and would meet me back at your office at 1:15 p.m. This was the arrangement when we walked out of your office. I was back to your office a little before one. The outer office girl asked if I were waiting for you. I said 'Yes.' and she said, 'Mr. McKelvy isn't going to be in any more today.' I said, 'Yes, he is to be back at 1:15—that was our arrangement just before lunch.' 'I will wait.' Then approximately at 1:20 she said: 'I really don't think he will be back as he is going out to his new home.' I asked what the telephone number was; and she said, 'I don't know, he has no telephone out there yet.' I asked what the address was; and she said, 'I don't know.' I asked if there wasn't someone in the office that did; and she said, 'I am sure there isn't.' I waited until about 3:30 then came home. It was about that time that I was really putting on the pressure to get the suit started." Mr. McKelvy said:

"I don't remember that I ever had such an appointment with you and let you sit. I don't deny it, but we just don't do business like that." I said: "At that first meeting in your office after I told you of my gripe, you had Mr. Skeel in and told him the story. Mr. Skeel said, 'Well, you can't hold the Casualty Company—and only Macri, if you have absolute segregated costs as this is in the contract and that is not.' " Now, I said: "That's impossible in a situation like this. Now why didn't you or Mr. Skeel inform me at that time that Continental Casualty was an account of yours?" Mr. McKelvy said: "Well, we didn't think they would be involved." I said: "No, you thought that we would sue as many others did in the past and let it be called damages and we would lose our case." Mr. McKelvy said: "Well, I advised you to get Olson and he did you a good job, didn't he?" I said: "Yes, you gave us the name of about four attorneys and we selected Olson and that was on my question of a good attorney in Yakima." McKelvy said: "I spent some time on the phone with Mr. Olson. I called Mr. Olson twice and I also have some copies of letters in my files that I wrote to Olson telling him to watch out so that it would not be called damages." I said: "You Did!!—You ask Olson who told him at the first and second meetings not to use the word damage, that we were suing for cost, and I told him at the third meeting after he used the word that if he were going to use it again it meant only one thing to me, that I would have to get another attorney. That he shouldn't even think the word in connection with this suit. A suit in dam-

ages may come later, this has to be in Quantum Meruit." Mr. McKelvy said: "Well, I would like to get this account off the books, so I'll leave it up to you. You pay me what you want to and we'll call the account paid. I just want something so we can close our books." I said: "I'm not doing anything about it." Mr. McKelvy said: "Well, if that's it, we'll just have to write it off and forget about it then." (He then left our office.)

(61) 8-18-1950: P. L. Darcy and plaintiff drove to Olson's office at Yakima, Washington, and checked with Mr. Olson and went through Olson's files to see if there were any such letters as McKelvy claimed he has sent to Mr. Olson and found that there were none in the files and Mr. Olson denied that he ever had such a phone call or other conversation as Mr. McKelvy had claimed he had with Olson. See 8-16-1950 hereinabove. And as to the claim made by Mr. McKelvy on 8-16-1950, "We have been in business and had a good reputation since before the turn of the century." This statement does not quite click when compared with an article in the Oregon Journal of 7-25-1948 under the caption "Skeel Selected by Trade Group." A part of the said article reads: "Senior Partner of the legal firm of Skeel, McKelvy, Henke, Evenson & Uhlmann, he is also a director of several leading financial, industrial and shipping concerns. He has served on the committee for economic development, highway and traffic study groups, the Community Chest, Rotary International and other organizations.

"He came to Seattle 40 years ago and in 1917 founded the legal firm which he now heads.

"The next trade conference is to be held in Portland, November 15 and 16, with the Portland Chamber of Commerce as host."

There is also an item in the Oregon Journal of July 27, 1948, which shows a picture of Tom W. Holman and below it reads:

"Tom W. Holman, Seattle attorney and head of Washington Highway department advisory committee, is president of Western Association of State Highway Officials which is holding a three-day convention here."

(62) 10-4-1950: Plaintiff called Mr. Harry L. Olson at his home in Yakima, Washington, at approximately 7:30 p.m. Plaintiff asked Mr. Olson what day would be convenient for him to meet with plaintiff and plaintiff's Portland attorney to check over with him the rough draft of a complaint so they could put the finishing touches on it and get the damage suit filed. Mr. Olson said, "Most any time, Matt, as long as you let me know a couple of days ahead of time so I won't be in Court when you get here, and so I can arrange to give the necessary time to the conference. When do you and Hill want to be up?" Plaintiff said, "It will be another attorney because Hill has not accomplished anything worth while. I don't think Hill likes to handle a suit in conspiracy, and also because of the parties named." Olson asked who Plaintiff was naming. Plaintiff named all the defendants herein,

and Olson then said, "Matt, if you are naming McKelvy, I can't go along with you on it. Why don't you let him out of it? He's only the agent of Continental Casualty Company." Plaintiff said, "Why should I? He is the worst offender." Mr. Olson said, "Well, you can always subpoena him." Plaintiff said, "No, I wouldn't do a thing like that; even tho he's only the agent, he's still one of the wrongdoers." Olson then said, "Well, Matt, I'm sorry, but McKelvy recommended me to you." Plaintiff said, "No, he recommended four attorneys, and you were the third attorney he named, so you shouldn't count it that way." Olson said, "Even so, I just can't go along with you if you're naming another attorney, though I will say I think you have a good case against the bonding company." Plaintiff said, "O.K. then, Harry, I'll just have to get someone else then, I guess."

IV.

That as the sole and proximate result of the aforesaid intentional, concerted conspiracy of Defendants to injure, damage and defraud the Plaintiff, Plaintiff has suffered damages to his credit, to his business and has suffered serious monetary damage in the preparation and conduct of the aforesaid litigation in the sum of $1,000,000.00.

Wherefore, Plaintiff prays that he have judgment against Defendants, and each of them in the sum of $1,000,000.00.

/s/ M. C. SCHAEFER,
Plaintiff.

[Endorsed]: Filed Feb. 9, 1951.

[Title of District Court and Cause.]

DEMAND OF PLAINTIFF FOR JURY TRIAL

Comes now the Plaintiff, and demands a trial by jury of all the issues involved in this cause said issues being more particularly disclosed by the amended complaint on file herein.

Dated February 9th, 1951.

/s/ M. C. SCHAEFER,
Plaintiff.

Return on Service of Writ attached.

[Endorsed]: Filed Feb. 9, 1951.

[Title of District Court and Cause.]

MOTION TO DISMISS

Comes now W. R. McKelvy, one of the defendants above named, and moves the court for an order to dismiss the action against this defendant for the following reasons:

1. The amended complaint fails to state a claim against this defendant upon which relief can be granted.

2. The cause, if any, is barred by the Statute of Limitations. That more than two years has expired since the commencement of any cause of action against this defendant.

3. The complaint is verbose, redundant, prolix and a violation of Rule 8 (a), 10 (b), 12 (f) of the Federal Rules of Civil Procedure applicable to the district courts of the United States. 28 U.S.C.A. following Section 723c.

4. There is a misjoinder of parties defendant.

5. The allegations of the complaint are inconsistent.

SKEEL, McKELVY, HENKE,
EVENSON & UHLMANN,

/s/ W. PAUL UHLMANN,

/s/ A. P. CURRY,
Attorneys for Defendant,
W. R. McKelvy.

Receipt of Copy acknowledged.

[Endorsed]: Filed Feb. 16, 1951.

[Title of District Court and Cause.]

ALTERNATE MOTION TO STRIKE

In case defendant, W. R. McKelvy's motion to dismiss is denied this defendant, defendant moves the court to strike from the amended complaint the following:

1. That portion of the amended complaint on Page 36, Lines 13 to 17, inclusive, and Lines 29 to 32, inclusive, together with all of Pages 37 to 44, inclusive, and Lines 1 to 4, inclusive, on Page 45

on the ground and for the reason that same is inconsistent with the allegations of the amended complaint found on Pages 63, 66, 74, 84 and 86 wherein the complaint on its face shows that the only attorneys of record for Continental Casualty Company in the case referred to wherein this plaintiff sought recovery from Continental Casualty Company and others in the District Court of the United States for the Eastern District of Washington, Southern Division, Cause No. 246, are Eugene D. Ivy and Elwood Hutcheson. Further, the excerpt of the proceedings set forth in plaintiff's amended complaint on Pages 36 and following are part of the record in a cause in which plaintiff herein was not a party, to wit, the consolidated trial of five causes of action instituted in the District Court, Eastern District of Washington, Southern Division, and being numbered causes 250, 251, 255, 257 and 267. See transcript of record on appeal to the Ninth Circuit in said causes being Nos. 11722, 11723, 11724, 11725 and 11726, Pages 19 to 39, and which was apparently received by stipulation in the suit referred to by plaintiff. See transcript of record in the Supreme Court of the United States in the cause entitled "Continental Casualty Company, a corporation, petitioners, vs. M. C. Schaefer, an individual, etc." Pages 2239 to 2251 and the pre-trial order in said cause set forth in Vol. 1 of the aforementioned record, Page 76, and the appearances recorded in said cause on Page 151 of Vol. 1 of said record showing that Eugene D. Ivy was the attorney of record for defendant, Continental Casu-

alty Company, during the trial of said cause. The amended complaint and the proceedings mentioned definitely establish that neither Willard E. Skeel nor any member of the firm, Skeel, McKelvy, Henke, Evenson & Uhlmann, appeared or participated in the aforementioned cause #246 instituted by M. C. Schaefer against Continental Casualty Company.

2. Line 12, Page 28, including the words "through its agents Philp & McKelvy and Defendants Philp & McKelvy," for the reason that the allegations throughout the complaint are inconsistent with the statement that defendant, McKelvy, was in any way involved in the litigation in Oregon therein referred to and the summons and amended complaint set forth on Pages 29 and following show the suit was instituted by the Macris only.

SKEEL, McKELVY, HENKE,
EVENSON & UHLMANN,

/s/ W. PAUL UHLMANN,

/s/ A. P. CURRY,

Attorneys for Defendant,
W. R. McKelvy.

Receipt of Copy acknowledged.

[Endorsed]: Filed Feb. 16, 1951.

[Title of District Court and Cause.]

MOTION TO DISMISS OR, IN THE ALTERNATIVE, MOTION TO STRIKE

The defendant Continental Casualty Company, a corporation, moves the Court to dismiss the action against Continental Casualty Company, a corporation, for the following reasons:

(1) The Complaint fails to state a claim against this defendant upon which relief can be granted.

(2) The action is barred by the Statute of Limitations.

(3) The Complaint is in violation of Rules 8 (a), 10 (b) and 12 (f) of Federal Rules of Civil Procedure.

And in the alternative, but without waiving the foregoing Motion to Dismiss, and specifically insisting upon the same, this Defendant moves the Court to strike the action on the ground that the Complaint is verbose and redundant.

/s/ CARL E. CROSON,

/s/ WILLARD HATCH.

Notice of Motion

To M. C. Schaefer, Plaintiff:

Please take notice that the undersigned will bring the above Motion on for hearing before this Court at Room ...., United States Courthouse, Seattle,

Washington, on the .... day of ....., 1951, at 10:00 o'clock in the forenoon of that day, or as soon thereafter as counsel can be heard.

/s/ CARL E. CROSON,

/s/ WILLARD HATCH.

STATEMENT OF REASONS IN SUPPORT OF MOTION AND LIST OF CITATIONS

A Motion to Dismiss a Complaint should be sustained where averments of the Complaint show that the plaintiff cannot state a cause of action upon which he can recover.

Gromacki v. Armour & Co.,
76 F. Supp. 752.

Diesinger v. American & Foreign Insurance Co., 2 F.R.D. 221.

"Conspiracy" means a combination of two or more persons by concerted action to accomplish an unlawful purpose or some purpose not in itself unlawful by unlawful means.

Kietz v. Gold Point Mines,
5 Wn. (2d) 224, 105 P. (2d) 71.

Hyak River Packing Co. v. Huglan,
143 Wash. 229, 255 Pac. 123.

Alaska S. S. Co. v. International Longshoremen's Assn. of Puget Sound, 236 Fed. 964.

Ransom v. Matson Nav. Co.,
1 F. Supp. 224.

There must be a preconceived plan to accomplish the purpose.

Sabin v. Frederick,
236 Mich. 501, 211 N.W. 71.

State of Mo., ex rel., and to Use of DeVault v. Fidelity & Casualty Co., 107 F. (2d) 243.

Common design is of the essence of the conspiracy.

U. S. v. American Column & Lumber Co.,
263 Fed. 147, affd. 257 U.S. 377, 66 L. Ed. 284.

Wills v. Lloyds,
6 Cal. (2d) 70, 56 P. (2d) 517.

The minds of the conspirators must meet understandingly so as to bring about an intelligent and deliberate agreement to do the acts and to commit the offense charged.

Kietz v. Gold Point Mines,
5 Wn. (2d) 224, 105 P. (2d) 71.

Dart v. McDonald,
107 Wash. 537, 182 Pac. 628.

The mere knowledge, acquiesence or approval of the act, without cooperation or agreement to cooperate, is insufficient.

Burton v. Maupin,
(Mo. App.) 281 S.W. 83.

Gerdes v. Reynolds,
30 N.Y.S. (2d) 755.

It is essential to create civil liability for conspiracy that there has been an overt act done by

one or more of the conspirators pursuant to the scheme and in furtherance of the object.

No. Ky. Telephone Co. v. So. Bell T. & T. Co.,
1 F. Supp. 576, affd. 73 F. (2d) 333, Cert. den. 294 U.S. 719, 79 L. Ed. 1251.
Mox, Inc., v. Woods,
202 Cal. 675, 262 Pac. 302.
Harvey v. Tucker,
136 Kan. 61, 12 P. (2d) 847.

Complaint alleging tortious acts which were committed at a time clearly within bar of state statute of limitations was subject to dismissal, notwithstanding averment that conspiracy was continuing.

Moffett v. Commerce Trust Co.,
75 F. Supp. 303.

The cause of action if in conspiracy is barred by Section 165 of Remington's Revised Statutes, of Washington.

Mitchell v. Greenough,
100 F. (2d) 184.

A cause of action does not consist of acts but of unlawful violation of a right which the facts show.

Patten v. Dennis,
134 F. (2d) 137.

The complaint must allege damages.

Moffett v. Commerce Trust Co.,
87 F. Supp. 438.
Ransom v. Dollar S.S. Line,
2 F. Supp. 409.

The objection that the Complaint is verbose and redundant in violation of Rule 8 (a), 10 (b), and 12 (f) of the Federal Rules of Civil Procedure is properly taken by a Motion to Dismiss or by a Motion to Strike.

Bockelman v. Seaton,
4 F.R.D. 326.

Capdevielle v. American Commercial Alcohol Corp., 1 F.R.D. 365.

Buckley v. Music Corporation of America,
1 F.R.D. 602.

Attached to the Memorandum of Authorities is a brief analysis of the 92-page Amended Complaint, setting forth those instances in which Continental Casualty Company is referred to either directly or by general allegation regarding all defendants. The purpose of this analysis is to illustrate again the failure of plaintiff to show any concerted action or agreement between the parties hereto.

Respectfully submitted,

/s/ CARL E. CROSON,

/s/ WILLARD HATCH.

Analysis of Complaint

Page 1—Between March 2, 1944, and August 18, 1950:

Plaintiff suffered substantial damages as a result of the hereinafter alleged overt acts of defendants, who wrongfully and maliciously conspired, combined and confederated together with

wilful and malicious intent to injure, defraud and damage defendant.

Page 1—12-7-43:

Philp signed as attorney-in-fact for Continental Casualty Company the Performance and Payment Bonds posted by Macri.

Page 5—4-21-44:

Macri, Philp, Goerig, and Continental Casualty, through Philp, its attorney-in-fact, attempted from beginning of subcontract to bankrupt plaintiff by not paying plaintiff per contract, by not performing the work or performing it badly.

Page 6—7-15-44:

Date of termination of joint venture between Macri, Philp and Goerig, which plaintiff alleges was effective as to plaintiff but not as to Continental Casualty.

Page 12—11-1-44:

Plaintiff employed McKelvy to sue Macri and Continental Casualty; plaintiff informed McKelvy that Macri was bonded by Continental Casualty. Mr. Skeel advised plaintiff that he couldn't hold Continental Casualty.

Page 22—1-3-45:

All defendants knew that Macri had done no preparatory work on Specification No. 1068.

Page 22—1-23-45:

All defendants knew that Macri was receiving payment for excavating as specified, although ac-

tual excavation was not according to specifications, and that, therefore, plaintiff had a claim against Macri.

Page 25—About October 15, 1945:

McKelvy advised plaintiff that the chances of holding Continental Casualty were slim.

Page 26—10-20-45:

Plaintiff insisted that McKelvy state the date suit would be filed against Continental Casualty and the Macris. Plaintiff then informed that McKelvy could not represent plaintiff because Macri was a good customer of Continental Casualty and Continental Casualty was one of McKelvy's largest accounts. All of the aforesaid acts by McKelvy were in furtherance of the original conspiracy of Macri, Philp, Goerig, and Continental Casualty, through Philp and McKelvy.

Page 27—10-22-45:

Plaintiff retained Olson to bring law suit against Macri and Continental Casualty and do all things necessary to protect plaintiff in all his rights. (Apparently plaintiff instructed Olson at this time to commence the conspiracy suit.)

Page 28—12-14-45:

Macri and Continental Casualty, through Philp and McKelvy, its agents, filed malicious suit in Oregon on Specification 1068.

Page 34—1-17-46:

After plaintiff's suit was filed in Yakima, the aforesaid conspiracy was furthered by Philp,

Goerig, Macri, and Continental Casualty by delaying, appealing separately and delaying payment as follows: Continental Casualty informed plaintiff of the joint venture in a secret letter to plaintiff's attorney.

Page 36—2-21-47:

Willard Skeel represented Continental Casualty in said Yakima suit (despite the quotation from the proceedings indicating that Willard Skeel appeared in Civil cause No. 246, the fact remains, of which the court may take judicial notice, that Willard Skeel appeared in such Civil Cause No. 250, to which plaintiff is not a party).

Page 62—5-1-47:

Judgment entered against Continental Casualty in plaintiff's suit.

Page 65—5-9-47:

Motion for new trial by Continental Casualty.

Page 66—5-20-47:

Motion denied.

Page 67—5-20-47:

Continental filed Notice of Appeal.

Page 67—5-26-47:

Continental filed Supersedeas bond.

Page 73—2-11-49:

Circuit Court of Appeals affirmed plaintiff's judgment.

Page 74—4-5-49:

Petitions for rehearing denied.

Page 85—5-14-49:

Continental Casualty filed Petition for Writ of Certiorari in the Supreme Court.

Page 85—6-20-49:

Petition denied. Continental filed Petition for Rehearing.

Page 85—10-10-49:

Continental's Petition for Rehearing denied.

Page 85—11-4-49:

Continental Casualty paid judgment. After argument with plaintiff concerning deletion of the words "interest, costs, etc.," on back of draft, which words were used in furtherance of Defendants' concerted plan and would have deprived plaintiff of his rights to bring this suit.

Page 85—11-9-49:

Draft paid.

Page 90:

In plaintiff's discussion with McKelvy concerning Mr. Olson, plaintiff revealed that he contemplated this suit at the time he instituted his action in Yakima.

Page 92:

As a result of the aforesaid intentional concerted conspiracy of Defendants, plaintiff suffered One Million Dollars ($1,000,000) damages to his credit and business and damage in the preparation and conduct of the aforesaid litigation.

[Endorsed]: Filed Feb. 19, 1951.

Law Offices
Skeel, McKelvy, Henke, Evenson & Uhlmann
Insurance Building
Seattle 4

February 16, 1951

Millard P. Thomas,
Clerk, U. S. District Court,
United States Court House,
Fifth Avenue and Spring Street,
Seattle 4, Washington.

Re: #2673 Schaefer v. Sam Macri, et al.

Dear Sir:

We hand you original and one copy of defendant, W. R. McKelvy's, Motion to Dismiss, Motion for Additional Security for Costs, Affidavit of W. Paul Uhlmann, Supplemental Memorandum of Defendant, W. R. McKelvy in Support of Motion to Dismiss, Alternate Motion to Strike and Affidavit of Service.

This cause was assigned to the Honorable Dal M. Lemmon. I am advised by your office that Judge Lemmon does not intend to return to Seattle in the near future. We, therefore, are in a quandary as to how to note our motions for hearing. It is agreeable to this defendant to submit the matter to Judge Lemmon on the memorandum and this letter.

As you will note from the Affidavit of Service, we are sending a copy of this letter to the plaintiff with the pleadings. Therefore, if it is agreeable to him to submit the motions on the memorandums

and the record, we suggest that he write to you to that effect.

Our stipulation to submit the matter in this manner, however, is conditioned upon your forwarding to Judge Lemmon the Volumes 1 and 5 of the transcript of record in the cause entitled "In the Supreme Court of the United States, October Term, 1948, Continental Casualty Company, Petitioner vs. M. C. Schaefer, Respondent," and the transcript of the record in the case presented to the United States Circuit Court of Appeals for the Ninth Circuit, Nos. 11722, 11723, 11724, 11725 and 11726, which we will file with our motions in your office.

Our request in this matter is based upon Atlantic Fruit Co. v. Red Cross Line, 5 F. (2d) 218, which holds that the federal courts take judicial notice of any reported decisions and in doing so may examine the records.

Our motion to strike is based on the contention that the excerpts of the transcripts set forth in the amended complaint are in fact transcripts of the records in the Causes Nos. 11722, 11723, 11724, 11725 and 11726, U. S. Circuit Court of Appeals, Ninth Circuit, and were not a part of the proceedings in the Schaefer case except that a portion of the transcript in these five cases by stipulation was apparently received in evidence in the Schaefer case; the point being, that Willard E. Skeel was not attorney of record for Continental Casualty Company in the Schaefer case and did not participate at any time in the Schaefer case. The Schaefer case is reported in 173 F. (2d) 5.

We will be glad to have you advise us if we should do anything further with reference to this matter; or if Judge Lemmon intends to return to Seattle in the near future, we will be glad to note the motions to be heard before him.

Very truly yours,

/s/ W. PAUL UHLMANN.

WPU/mm
Encls.

[Endorsed]: Filed Feb. 16, 1951.

[Title of District Court and Cause.]

AFFIDAVIT OF SERVICE

State of Washington,
County of King—ss.

A. P. Curry, being first duly sworn on oath, deposes and says: That at all times herein mentioned I was and am now a citizen of the United States, over the age of twenty-one years, competent to be a witness in the above-entitled action, not a party thereto and in no wise interested therein.

That on the 16th day of February, 1951, I served the plaintiff in the above action with Defendant, W. R. McKelvy's, Motion to Dismiss, Motion for Additional Security for Costs, Affidavit of W. Paul

Uhlmann, Supplemental Memorandum in Support of Motion to Dismiss, Alternate Motion to Strike (all referring to Plaintiff's Amended Complaint) and a copy of a letter dated February 15, 1951, directed to the Clerk of the above-entitled court by placing in the United States mail with postage prepaid and registered, return receipt requested, a letter enclosing said pleadings and copy of letter, directed to the plaintiff, M. C. Schaefer, at 3535 E. Burnside Street, Portland 15, Oregon.

/s/ A. P. CURRY.

Subscribed and sworn to before me this 16th day of February, 1951.

[Seal] /s/ WILLARD E. SKEEL,
Notary Public in and for the State of Washington,
Residing at Seattle.

[Endorsed]: Filed Feb. 16, 1951.

[Title of District Court and Cause.]

AFFIDAVIT OF W. PAUL UHLMANN

State of Washington,
County of King—ss.

W. Paul Uhlmann, being first duly sworn on oath, deposes and says: That he is attorney of record for defendant, W. R. McKelvy. That security for costs has been provided by plaintiff by depositing with the clerk of the court the sum of $250 as

security for all defendants. That each of the defendants have entered appearances and will separately defend the action and there is no community of interests between the defendants so far as the preparation of the defense is concerned. Therefore each defendant must anticipate substantial expense to defend this action. That separate depositions and other procedures will be required in the defense of this action and $250 is not sufficient to cover the expenses of all of the defendants. That it is affiant's opinion that the rule of court requiring security of costs contemplates the security of each defending defendant separately appearing to be protected against a nonresident plaintiff in the sum of not less than $250.

/s/ W. PAUL UHLMANN.

Subscribed and sworn to before me this 14th day of February, 1951.

[Seal] /s/ WILLARD E. SKEEL,
Notary Public in and for the State of Washington,
Residing at Seattle.

Receipt of copy acknowledged.

[Endorsed]: Filed Feb. 16, 1951.

[Title of District Court and Cause.]

MOTION FOR ADDITIONAL SECURITY FOR COSTS

Comes now the defendant, W. R. McKelvy, and moves for an order directing the plaintiff to file additional security of costs so as to secure each defendant named in an amount of not less than $250.

This motion is based upon the records and filed herein and upon the Affidavit of W. Paul Uhlmann, attached hereto.

SKEEL, McKELVY, HENKE, EVENSON & UHLMANN,

/s/ W. PAUL UHLMANN,

/s/ A. P. CURRY,

Attorneys for Defendant,
W. R. McKelvy.

Receipt of copy acknowledged.

[Endorsed]: Filed Feb. 16, 1951.

[Title of District Court and Cause.]

MOTION TO DISMISS OR, IN THE ALTERNATIVE, MOTION TO STRIKE

The defendants, Sam Macri, Don Macri and Joe Macri, move the Court to dismiss the action against them and each of them for the following reasons:

(1) The Complaint fails to state a claim against this defendant upon which relief can be granted.

(2) The action is barred by the Statute of Limitations.

(3) The Complaint is in violation of Rule 8 (a), 10 (b) and 12 (f) of Federal Rules of Civil Procedure.

And in the alternative, but without waiving the foregoing Motion to Dismiss, and specifically insisting upon the same, this Defendant moves the Court to strike the action on the ground that the Complaint is verbose and redundant.

/s/ GRANVILLE EGAN,
Attorney for Above-Named
Defendants.

NOTICE OF MOTION

To M. C. Schaefer, Plaintiff:

Please take notice that the undersigned will bring the above Motion on for hearing before this Court at Room ...., United States Courthouse, Seattle, Washington, on the .... day of ....., 1951, at 10:00 o'clock in the forenoon of that day, or as soon thereafter as counsel can be heard.

/s/ GRANVILLE EGAN.

[Endorsed]: Filed Feb. 21, 1951.

[Title of District Court and Cause.]

MEMORANDUM OF M. C. SCHAEFER RESISTING MOTION OF DEFENDANT W. R. McKELVY TO DISMISS PLAINTIFF'S AMENDED COMPLAINT

The amended complaint should be sustained because:

1. The Statute of Limitations does not bar this action.

The running of the Statute of Limitations in a civil action for conspiracy has not been the subject of judicial determination in many instances. However, in State vs. Arkansas Lumber Co., 260 Mo. 212, 169 SW 145 the Court held that the Statute commences to run as of the date of the last overt act under the conspiracy. Also in Montgomery vs. Crum, 199 Ind. 660, 161 NE 251, the Court also held that in an action for damages resulting from one continuous wrong extending over a period of years the statute of limitations does not begin to run until there is a cessation of the overt acts constituting the wrong. To the same effect also is the holding in Clark vs. Mochetti, 92 Colo. 365, 21 P (2d) 182; 41 Hun 645, 3 N.Y.S.R. 309.

In Northern Kentuckly Tel. Co. vs. Southern Bell Tel. Co. 73 F (2d) 333, 97 A L R 133 is an exhaustive opinion citing the Rule in Civil conspiracies, and holds that the statute begins to run as of the last of a contemplated series of acts and further holds that the act of one conspirator is attributable to all after the formation of the con-

spiracy and during its existence. See also the annotation in 97 ALR 137.

It must also be noted that in this action the Federal Court will ordinarily apply state rules as it is a case where jurisdiction is based on diversity and on amount. No decision can be found wherein the Supreme Court of the State of Washington has ruled on the point involved here and none is cited by Defendant.

The case relied on by defendant, i.e., Mitchell vs. Greenough, is one in which the overt act clearly occurred beyond the limitation period; here, however, there are acts alleged within the limitation period and within a few months of the filing of Plaintiff's original complaint.

2. The complaint does allege a concert of the parties to accomplish either an unlawful purpose or a lawful purpose unlawfully.

In 168 P (2d) 797 Lyle vs. Hoskins, the Washington Supreme Court laid down the rule that allegation of a conspiracy and proof thereof by circumstantial evidence is all that can be required due to the very nature of the offense and that direct and positive allegation and proof is not required.

Here plaintiff alleges in Par. III, beginning line 23, pg. 1, that between 3-2-44 and 8-18-50 Defendants did wrongfully and maliciously conspire, combine and confederate together with wilful and malicious intent to injure and damage plaintiff, and that as the direct and proximate result of the overt acts committed pursuant thereto (which said acts are alleged in detail in the pages following) plain-

tiff suffered the damages more fully alleged in Par. IV, line 9, pg. 92.

The principal allegations of conspiracy are that the Defendants Macri on 12-7-43 signed a government contract with the Bureau of Reclamation for certain work on the Roza Irrigation Project near Yakima, Washington, and on the same day Defendant Continental Casualty Co. by the agent and attorney in fact, the Defendant, Clyde Philp, issued the performance and payment bonds required by said Bureau of Reclamation, but only four days later on 12-11-43 this same Clyde Philp, together with Defendant A. J. Goerig entered into a silent partnership agreement with each other and also as joint venturers with Defendants Macri in the performance of said general contract with Bureau of Reclamation, none of which facts were known to Plaintiff until 1946.

That Plaintiff on 3-14-44 entered into a subcontract with Defendants Macri to do certain form, steel and concrete work on said Roza Irrigation Project, under which certain preparatory work was to be done and certain materials were to be furnished by Defendants Macri (Items I through 5 of specific allegations under Par. III).

That Defendants Macri purposely defaulted in the furnishing of material and performance of their preparatory work from 3-14-44 to 7-31-44 so that Plaintiff could not commence pouring until 7-31-44, for the purpose of causing plaintiff to become bankrupt and to cause plaintiff severe financial hardship and in fact did cause severe hardship and almost

caused bankruptcy.

On 7-31-44 Defendants Macri then agree orally to expedite their work so that Plaintiff could complete his by 9-15-44, but again from 7-31-44 to 10-31-44 the same wilful defaults were committed by Defendants Macri and they further violated their contract with Plaintiff by further refusing and failing to make payments to Plaintiff as required by the terms of the subcontract with Plaintiff.

On 11-1-44 Defendant McKelvy became a member of the conspiracy. On that date plaintiff employed Defendant McKelvy, made full disclosure of the acts of Defendants Macri, supplied him with memoranda of the conversations and meetings and oral agreements with said Macris, that Defendant Continental Casualty Co. might be involved; and sought the services of Defendant McKelvy to terminate the said subcontract with the said Macris and sue for the reasonable value of the work done by Plaintiff.

That the firm of which Defendant McKelvy is a partner, at that time and for years before and since represented Defendant Continental Casualty Co., but despite the conflict of interest, Defendant McKelvy made no disclosure to Plaintiff that his firm represented Continental Casualty Co.; and Plaintiff did not discover this fact until much later; that Defendant McKelvy accepted Plaintiff's employment and agreed to take steps to accomplish the desired result, by negotiation if possible and by suit if necessary. By inter-office memorandum dated 11-8-44 (photostat at end of item 16 following page 20) Defendant McKelvy by his own handwriting indicated he felt

there was a good cause of action and that the remedy was in quantum meruit; yet the circumstances and facts alleged in items 6, pg. 5; 8, pg. 6; 17, 18, 19, 20, 21, 21A on pg. 22-23-24 and ending top of pg. 25; and particularly in Item 24, pg. 25; Item 25, pg. 26, clearly show that the advice given and actions taken by Defendant McKelvy were all intended to and in fact did protect McKelvy's client, Continental Casualty Co., and also the Macris, and were intended to and in fact did further injure and damage plaintiff in that Defendant McKelvy first prevailed upon Plaintiff to complete the work rather than rescinding or terminating the contract; by not terminating the second subcontract he made it possible for the totally unfounded suit to be filed in Multnomah County, Oregon (Item 28, page 28).

Further in that he made possible the asserted dissipation or rumored possible secretion of assets by Defendants Macri, and thereafter advised Plaintiff to follow a course of action amounting to fraudulent conveyance of assets with possible criminal overtones, and finally when none of these succeeded purposely attempted to permit Plaintiff to delay filing suit against Defendants Macri until the statute of limitations had run, and but for the diligence of Plaintiff might have succeeded in any one of his efforts.

That defendants Macri then furthered the conspiracy by filing a malicious suit in Portland which was completely without foundation and known to be so and intended to dry up Plaintiff's credit and

thus render impossible the prosecution of his suit in Yakima, Washington; that their action in Portland did dry up his credit and only by the most extreme application of perseverance could Plaintiff survive at all in his business operations there, and even yet has not fully recovered from the effects of said suit and has lost large sums of money as the direct result thereof.

Finally after trial of the Yakima suit by another attorney (who did what McKelvy had agreed to do) the Defendants Macri and Continental Casualty Co. by unfounded actions and by abuse and misuse of the judicial process, all in furtherance of the original conspiracy, dragged the matter on through separate appeals and wilful delays in making settlement after final judgment on appeal to 11-9-49, and on 8-16-50 Defendant McKelvy again entered the picture by trying to pressure Plaintiff into making any kind of payment on his bill to Plaintiff to preclude the filing of the present case.

In the light of all authorities cited by Defendant and of Lyle vs. Hoskins 168 P (2d) 797, supra, it is abundantly clear that the web of intrigue, conflicting interests, and inter-related activity of the several parties defendant, that the wealth of detail alleged in support of the general allegation of a conspiracy to damage Plaintiff amply support Plaintiff's allegation, prevents its being a mere conclusion and is necessary in order to state a cause of action.

3. As to Defendant's objection that the com-

plaint is verbose, the authorities and argument last above are sufficient to meet this objection, as such allegation of the specific statements, omissions and actions is necessary to state a cause of action. In the motion of Defendant to Plaintiff's first cause of action the position taken was that the complaint contained merely conclusions and not ultimate fact from which the conclusion could be drawn. Now that Plaintiff alleges the facts in detail to support the conclusion he seeks to have them stricken as being prolix and verbose. Plaintiff contends that the facts as stated are necessary and proper.

4. As to Item 4 of Defendant's Motion, there is a misconception of Plaintiff's allegations. Plaintiff alleged only that the firm of Skeel, McKelvy, et al., represented Continental Casualty Co. at the time Defendant McKelvy was employed by Plaintiff and continued thereafter to represent them and in fact represented Defendant Continental Casualty Co. on the first day of the trial of Plaintiff's case vs. Macris and Continental Casualty Co. in Yakima, as more fully appears from the transcript set out in full. Thereafter it is admitted that at least of record in that case other counsel represented Continental Casualty Co. and there is no inconsistency whatsoever.

[Endorsed]: Filed April 16, 1951.

[Title of District Court and Cause.]

MEMORANDUM OF M. C. SCHAEFER RESISTING MOTION OF CONTINENTAL CASUALTY CO. TO DISMISS OR TO STRIKE

Defendant's proposition of law and citation of supporting authorities is generally conceded to be correct. Plaintiff contends, however, that the facts alleged in his amended complaint do state a cause of action as to Defendant Continental Casualty Company.

The essential facts alleged as to participation by Defendant Continental Casualty Co. in a conspiracy to injure, defraud and damage Plaintiff, are as follows:

1. From the inception of work by Plaintiff in 1944 on his subcontract ostensibly with the Defendants Macri for concrete work at Yakima, Washington, til August, 1950, there was a web of intrigue, behind the scenes activity, undisclosed parties whose interests were interlocking with one another and antagonistic to Plaintiff. One of the principal participants was Continental Casualty Company.

Thus Plaintiff was made the brunt of wilful, malicious and intentional activity—so far as then known—by defendants Macri intended to discredit, bankrupt and ruin Plaintiff from 1944 when he started work on the Roza Irrigation Project, until 1950. But as the plot unfolded it became apparent that all the initial phases of the common scheme

were joined in by Continental Casualty Company behind the scenes and off the record and later Continental Casualty Co. lead the way.

Thru its agent and attorney in fact, the Defendant Philp, Continental Casualty Company issued performance and payment bonds, guaranteeing performance and payment by the Defendants Macri at the same time the said Philp was also a partner with one Goerig and jointly Philp and Goerig were silent joint venturers with the Defendants Macri on this work. Thus all the intentional acts ostensibly of the Macris, were actually the acts of Continental Casualty Co.

Then follows a complex series of actions, by the Macris, (and although not at the time known to Plaintiff) also by the Continental Casualty Company thru its agent Philp and by Philp and Goerig personally attempting to and almost succeeding in bankrupting Plaintiff and causing severe loss and damage.

Then there is injected into the conspiracy one W. R. McKelvy, attorney for Continental Casualty Company (again a fact not known to Plaintiff until a later date) who advised Plaintiff to follow courses of action which show beyond any equivocation that said McKelvy was working against Plaintiff for Continental Casualty Company, Macris and their joint venturers, Philp and Goerig and only by extreme diligence was Plaintiff able to prevent all the parties from succeeding in their scheme.

McKelvy also dealt very closely with one Holman the ostensible attorney for the Macris, but who

had formerly been associated in the office with McKelvy and who worked in close harmony with McKelvy at all times, including the filing of a totally groundless suit in Multnomah County, Oregon, when it became apparent that all other attempts to bankrupt Plaintiff were failing.

With defendant's general proposition of law and his citation in support thereof Plaintiff has no serious disagreement. Plaintiff does contend that the facts alleged in his amended complaint do state a cause of action as to Defendant Continental Casualty Company.

The essential facts, as to this defendant, are:

1. In 1943 its agent and attorney in fact, the Defendant Philp, signs performance and payment bonds for Defendants Macri and while still in the employ of Defendant Continental Casualty Co. its said agent Philp became a partner with the Defendant Goerig and Philp and Goerig became silent joint venturers with the persons being bonded by Continental Casualty Co. namely the defendants Macri. All this is known by Continental Casualty Company but not Plaintiff until several years later when Plaintiff filed a suit.

Then came the suit in Yakima which Continental Casualty Company and the Macris lost and which the Defendants Macri did not appeal within the time provided, but Continental Casualty Company did and thereafter the Court ruled that the Macris could appeal, despite being barred by the time limitation since Continental Casualty Company did ap-

peal within the permitted time. At all times thereafter including appeal to the U. S. Supreme Court, Continental Casualty Company led the way on this series of litigation and appeals. It did not follow along with its prime contractor.

Thus by a series of subversive maneuvers known to and acquiesced in by Continental Casualty Co. thru its agent and attorney, the Defendant, McKelvy, and later directly by Continental Casualty Company in leading the way and carrying the ball at all times after adverse judgment in Yakima, Defendant Continental Casualty Company was one of the prime participants in and causative factors of Plaintiff's damages.

Clearly, while the complaint necessarily is complex and difficult to phrase in a concise manner, it certainly does state facts supporting the general allegation of Defendant Continental Casualty Company being a participant in the conspiracy.

2. As to the Statute of Limitations point reference is made to Plaintiff's memorandum on McKelvy's similar motion.

3. As to the objection that complaint is verbose, Plaintiff concedes that the law is fairly stated, but maintains that any lesser allegation of details would possibly defeat the complaint on the grounds that the allegations are mere conclusions, rather than ultimate facts from which the conclusion of conspiracy could be drawn.

The authorities are so numerous that corporations are liable for the torts of their officers, agents

and employees as hardly to require citation, but attention is drawn to 13 Am Jr Corps. Sec. 1131, pg. 1056, which states the general rule and also the rule that specifically as to conspiracy a corporation is liable for acts of its officers, agents and employees in conspiracy with other persons.

[Endorsed]: Filed April 16, 1951.

[Title of District Court and Cause.]

PLAINTIFF'S STATEMENT RESISTING ALTERNATE MOTION OF DEFENDANT McKELVY TO STRIKE

1. The record shows on its face that Mr. Skeel, of the firm of Skeel, McKelvy, et al., did represent Continental Casualty Co. in Plaintiff's case, No. 246, in Yakima on the first day of the hearing and that thereafter other attorneys appeared. No argument is necessary, as the record speaks for itself.

2. Line 12, page 28, was an attempt on the part of Plaintiff to plead that the suit filed in Multnomah County, while admitted of record only by the Defendants Macri, was in fact the act of the other defendants as well and as such should be permitted to stand.

[Endorsed]: Filed April 16, 1951.

[Title of District Court and Cause.]

HEARING ON DEFENDANT'S, W. R. McKELVY, MOTION TO DISMISS

HEARING ON DEFENDANT'S, CONTINENTAL CASUALTY COMPANY, MOTION TO DISMISS FOR FAILURE TO STATE A CLAIM

Before: The Honorable Dal M. Lemmon, Judge.

January 11, 1951, 10:00 A.M.

Appearances:

M. C. SCHAEFER, Per se,

Appearing on his own behalf.

A. P. CURRY, ESQ.,

SKEEL, McKELVY, HENKE, EVENSON & UHLMANN,

Appeared on Behalf of the Defendant, W. R. McKelvy.

CARL H. CROSON, ESQ., and

WILLARD HATCH, ESQ., CROSON, JOHNSON and WHEELON,

Appeared on Behalf of the Defendant Continental Casualty Company.

Whereupon, the following proceedings were had and done, to wit:

The Clerk: M. C. Schaefer, an individual, versus Sam Macri, Don Macri and Joe Macri, individuals; W. R. McKelvy; Continental Casualty Company, a corporation; A. J. Goerig and Clyde Philp, individuals Defendants' Motions to Dismiss.

Are the parties ready?

Mrs. Curry: Defendant McKelvy is ready.

Mr. Croson: Defendant Continental Casualty is ready, your Honor.

Mr. Schaefer: Yes.

The Court: You may proceed. [2*]

Mrs. Curry: Your Honor, I am Mrs. Altha P. Curry, Counsel for Mr. McKelvy, associate of the office of Skeel, McKelvy, Henke, Evenson & Uhlmann.

This is the defendant, McKelvy's Motion to Dismiss. There are several grounds set forth in the motion. I will address the Court primarily on number 1, that there is no bond or stipulation of costs filed and the plaintiff by his allegations is a non-resident of the State of Washington; 2, the Complaint fails to state a claim against the defendant upon which release can be granted; and 3, the cause if any, has been barred by the Statute of Limitations, either under Sections 159 of Remington's Revised Statutes or Section 165 of Remington's Revised Statutes.

I would first like to review the Complaint because this has been written by a man who is not a lawyer and has much extraneous matter and it is best to get a picture of what it is.

*** Page numbering appearing at foot of page of original Reporter's Transcript of Record.**

For the convenience of the Court, I made an outline and attached it to the memorandum, the first memorandum, and called it an analysis of the Complaint. All it is, is just an outline of the Complaint.

Paragraph I, of course, is just jurisdictional. It does allege that the plaintiff is a resident of Oregon. Paragraph II, is quite long and involved. [3]

"(a)," under the sub-division (a), simply alleges, and briefly, all that this case sets forth is that the plaintiff had a sub-contract—that Macri apparently was the contractor. Schaefer had a sub-contract on the Roza Dam Project; and that he had a claim against the Macris.

The Court: I think in the instance of saving time, you may assume that I have read the pleading.

Mrs. Curry: Very well, your Honor. Then the Complaint simply alleges that the services of McKelvy were retained; that on October 20th, 1945, McKelvy told the plaintiff——

The Court: It doesn't allege the date of the retaining.

Mrs. Curry: No. It alleges, though, that on October 20, 1945, McKelvy advised the plaintiff he could not represent him in a suit against the Macris. Thereupon, he engaged counsel, was successful, the case was filed in Yakima.

There is no allegation and there was no connection of our office or McKelvy with that litigation after October 20, 1945. He was successful in the litigation, in fact, I believe he got a judgment of some $50,000 or $60,000—and that is all [4] there

is to it—and that he divulged certain information to McKelvy pertinent to the litigation and himself, and that McKelvy did not tell him that he could not represent him, because our office were counsel for Continental Casualty Company, until October 20th, 1945.

I believe this does not state a cause of action, but if it does it is barred by the Statute of Limitations. If it is a contract or a mal-practice suit against McKelvy, it is barred by 159 in three years. If it is a conspiracy case, it is barred under 165, a two-year Statute of Limitation, which definitely has been held by the case I have cited on page 3 of the first memorandum, Mitchell versus Greenough, 100 F. (2d) 184, a case coming out of this jurisdiction.

For convenience, because the Court is not familiar with our Statute of Limitations, I have brought the statute here.

The Court: Well, looking at the pleading and with the assumption that if there are faults and defects in it, those faults and defects might be cured by an amendment, the rule as I understand it on limitations of actions in conspiracy cases, the limitation begins to run upon the occurrence of an [5] overt act resulting in damage, or the last of a series of such acts.

In the pleading, what date is alleged as the last of those series of acts?

Mrs. Curry: So far as defendant McKelvy is concerned, it is October 20th, 1945.

The Court: If there were a conspiracy and McKelvy was a member of the conspiracy, anything

done in furtherance of the conspiracy would be chargeable, of course, to all of the conspirators. Assuming that allegations could be properly set forth, when was the last act charged against any of these defendants which might be alleged in furtherance of the conspiracy?

Mrs. Curry: There is no conspiracy alleged, though, I think, your Honor.

The Court: Assuming it could be alleged—taking that assumption. If the pleader had alleged that these parties had conspired together to do these things.

Mrs. Curry: I don't know. There is nothing that is an overt act or combination of individuals in the Complaint, there, to which you can point to a conspiracy with the possible exception of what transpired prior to October 20, 1945. There was some [6] litigation, yes, but there was no connection of the defendant, McKelvy, with that litigation.

The Court: I think probably you would agree it would be an abstract principle of law I have stated to you, that the statute runs from the last of a series of acts if it were charged that those acts were in furtherance of the conspiracy.

Mrs. Curry: Yes. So far as any of the defendants are concerned, I can see nothing so far as defending the litigation that could in any way be chargeable as a conspiracy, because our Court here has held that a person can prosecute a suit. Certainly, if they can prosecute a suit without any inquiry as to their intention——

The Court: As to your Statute of Limitations,

I think that was your third point, but you did mention some citation.

Mrs. Curry: So far as conspiracy is concerned, it is Section 165, the 2-year Statute of Limitations which is a catch-all in our Statute of Limitations. It is any other suit. If you want, I will read it to you. Mitchell versus Greenough, 100 F. 2nd, page 184. That came out of the Eastern Washington Court. That was a case arising in Eastern Washington. [7]

165, just for your information, is "An action for relief not hereinbefore provided for shall be commenced within two years after the cause of action shall have accrued."

159 applies to negligence and to an implied contract. It is a 3-year Statute of Limitations.

Section 4 of that reads, "An action for relief upon ground of fraud, the cause of action in such case not to be deemed to have accrued until the discovery of the aggrieved party of the facts constituting fraud."

It is my contention that if conspiracy is alleged, the 2-year Statute of Limitations applies if there is a cause against McKelvy on each malpractice or breach of contract or fraud. It runs from October 20, 1945.

Now, your Honor, I would like to address myself upon the question of conspiracy. I assume that the purpose of this Complaint was to allege a cause of action and conspiracy; otherwise, they could not incorporate the other defendants.

The Court: You first mentioned the point that there was no bond filed. Are you stressing that?

Mrs. Curry: Well, except this, that I would hate to come back here and argue this again after [8] the bond is filed, so I would just as soon present the argument on the whole matter.

But I would like to call attention that our local Rule 50 requires a bond to be filed when the Complaint is filed for a non-resident plaintiff.

The Court: Does it specify the amount?

Mrs. Curry: It specifies it shall be in the sum of $250. You will note we have moved for a bond of $1,000. I think at least a $500 bond should be required. And the Court has——

The Court: Was the $250 bond filed, though?

Mrs. Curry: No bond has been filed at all.

> "If the bond is not filed within the time specified or if the bond filed is found insufficient, the Court may order that a sufficient bond be filed within a specified time and if the order is not complied with the Clerk shall dismiss the action as of course for want of prosecution."

But the requirement is that upon the filing of the Complaint a $250 bond should be filed by a non-resident, and there was no bond filed in this case.

The Court: Of course, the Court would have the authority to relieve the plaintiff of his default and order the filing of the bond. [9]

Mrs. Curry: At a later time.

The Court: Yes.

Mrs. Curry: Yes. But I don't want to forego that requirement. Our statute in the State Court is that we are entitled to the bond as a matter of course.

May I address myself to the question of conspiracy? I have filed two memorandums; 1, I read this Complaint and determined because the word "conspiracy" had been used, that it was an attempt to allege a cause of action in conspiracy.

I later, after a little consideration, filed a supplemental memorandum on the theory that it may be possible to claim that there was a cause of action alleged against Mr. McKelvey, either for malpractice, negligence or breach of contract or fraud.

So far as conspiracy is concerned, we had a very famous case in this Court, Ransom versus Dollar SS Co.

Judge Netterer decided both of them and because of their importance had both of them reported. The first one was found in 1 F. Sup. 244. The second one I have cited in my memorandum in 2 F. Sup. 409. Edith Ransom was an actress and she brought many suits in this jurisdiction. She had been [10] quite successful as a movie actress but got herself into a great deal of difficulties and landed in Seattle from Honolulu. She brought these suits by herself without an attorney, although in one of the Ransom cases she did have an attorney. She charged a conspiracy to shanghai her out of Honolulu and said that she was doped and put on one vessel and then taken off and forced onto the other, and when she got here they put her in an insane ward. She sued

the Dollar Steamship, Matson, and the employees and someone else.

But the Court said there was no cause of action in conspiracy; that if he had any cause of action, it would be against each individual; in that case, one for assault, one for libel and one for malicious something or other; that a cause of action in conspiracy exists only if there is a combination of persons to accomplish an unlawful act or to accomplish a lawful act unlawfully. But there must be a combination of persons, a preconceived plan. These two cases also involve another case of Judge Netterer entitled Puget Sound Power and Light Company versus Asia, reported in 2 F. 2nd. 491.

Judge Netterer, in a second Ransom case, leans heavily upon his former decision in the Asia [11] case. But he pointed out that it must be a preconceived plan. I believe it is stated in one of those cases that the conspiracy has nothing to do with things already done; it only has to do with things planned for the future, expected in the future.

In the Asia case, the basis of the conspiracy, the Asia case was prosecuted by very eminent counsel on both sides. In that case the foundation of it was the bringing of an action; that was the basis of the conspiracy.

The Court said, "A person fancying a right has a right to sue, and the law does not inquire into his motives." Likewise, in this case, the defendants—regardless of McKelvy—fancying a defense, would certainly have a right to defend the action.

In particular there are two things in these three

cases. One is that you have to have a combination of persons to accomplish an unlawful purpose or a lawful purpose unlawfully; and also that the words "conspire" mean nothing; that you must allege facts from which the natural inference of a preconceived plan or a combination to do a lawful act unlawfully or an unlawful act must be a natural inference; that the words "conspire" are just conclusions. As Judge Netterer said in one case, [12] the word is impotent.

He says, "The word conclusion must be predicated upon facts and circumstances showing collusion to show they were going to act jointly with an unlawful enterprise." In addition to the fact that you must have these elements, it is also necessary to allege in the Complaint a malicious intention, and that does not appear in this Complaint in any particular. It must be shown that the combination was with a malicious intent to accomplish these causes.

Then another element, which is lacking so far as conspiracy is concerned, is damage. There is no allegation of damage. There must be an allegation of damages and it must be shown that the damage is the natural consequence of the unlawful acts.

As is said in one of these cases, "Damage is the gist of the action." And quoting Cooley on torts, "And as it is the wrong accomplished"—to have a cause of action of any kind you must have deprivation of a right.

The Court: If there was agreement to do the injury and nothing was done in furtherance, there would be no damage from the agreement.

Mrs. Curry: Yes. Also, the damage must [13] be shown to be the proximate result of the agreement and the concerted action of the overt act, as you have put it. There must be some damage from it.

What does this Complaint allege—that he got another lawyer and as a consequence won his law suit. It might have been if there was a combination, at all, that it resulted in his benefit, because certainly he was successful in his litigation, by his own pleading.

The only possible cause of action that could arise, here, was a breach of contract on the part of McKelvy for not bringing the suit when he agreed—according to the allegation in the Complaint—that he agreed to do so.

Now, we have a strong case on that in this jurisdiction; 78 W. My contention is there is not even any fraud alleged. 78 W. 662. The only possible thing, here, is a breach of contract.

In this case, Cornell versus Edsen, the headnote reads, "An action for damages against an attorney for wrongfully dismissing an action and concealing the fact is not an action for relief upon the ground of fraud but it is a breach of contract." In that case the question was whether or not the Statute of Limitations, Section 4, with reference to [14] fraud —the cause of action arising upon discovery would apply, or when the overt act was done which was a breach of contract. He dismissed the cause of action. The Court held that he breached his contract if it was a cause of action in fraud.

I can see that concealment in many cases may be the basis of a suit in fraud. But in those instances, in this jurisdiction, the cases I have cited all speak of the fact that concealment may be the basis of fraud, but it must be intentional; and the Courts say with intent to deceive.

Now, your Honor, I want to explain—because you may not be familiar with our theory of fraud because it is somewhat different in many jurisdictions. It is true, in this jurisdiction, a misrepresentation of a fact susceptible of knowledge—pardon me—a misstatement of facts susceptible of knowledge or an opinion with intent to deceive is fraud. Most jurisdictions hold that any misstatement must have an intent to deceive. Our jurisdiction holds that any misstatement of fact is in itself, although innocent, the basis of fraud. Be that as it may, all our cases that have to do with concealment, recognizing it as the basis of a suit for fraud, require that it must be with an intent to deceive. [15]

The Court: May I inject this, here? An action in conspiracy is an action in tort, is it not?

Mrs. Curry: Yes, your Honor.

The Court: If as a part of the conspiracy one of the overt acts in the conspiracy is the breach of a contract, nevertheless the action still being one in conspiracy is a tort? In other words, in furtherance of a preconceived plan, and in carrying out that preconceived plan if one of the conspirators breaches his contract, that doesn't change the nature of this action; the action is still in tort—the action for conspiracy.

Mrs. Curry: If there is a conspiracy. But then you have to have a combination of individuals.

The Court: Well, of course, I am looking forward to the possibility and exploring the possibility of curing faults in this Complaint by amendments thereto.

Mrs. Curry: I am addressing myself to this Complaint.

The Court: You are addressing yourself to this proposition, that if a conspiracy is not alleged in this Complaint is there a cause of action otherwise alleged against the defendant McKelvy.

Mrs. Curry: Yes. I don't know what the [16] purpose of this Complaint was; and the only basis of any law suit that I could see would be one against McKelvy, individually.

The Court: At least you have got the assumption that the plaintiff is attempting to plead a conspiracy.

Mrs. Curry: I am looking at it from the light of the actual facts, too. There is no conspiracy alleged and I know there was no connection of our office with this litigation, subsequently, so how could there be a conspiracy? That is the actual fact.

The Court: Well, either factually or inferentially it appears in this Complaint allegations of a breach of attorney's obligation to the client in divulging confidential information, is it not?

Mrs. Curry: No. He just said that he made statements to McKelvy——

The Court: He has alleged that McKelvy acted in close concert with the counsel.

Mrs. Curry: No, he doesn't. He is referring to a former associate of the office, Tom Holman, in that, but there is no connection of McKelvy in this litigation in this Complaint.

The Court: "Having worked in close harmony with [17] the attorney for the three Macris said attorney having formerly been associated in the same office with McKelvy." That is on page 6 of the Complaint, line 20 or 21.

Mrs. Curry: No. He is referring to Tom Holman, the attorney for the Macris, there. "Had formerly been associated in the same office with McKelvy."

The Court: To read from line 15, "And further in that defendant McKelvy at all times herein complained of was fully aware of Plaintiff's precarious financial condition, of all facts pertaining to Defendants Macris' default, having personally gone upon the project on one or more occasions to observe for himself the defaults complained of; and having worked in close harmony with the attorney for the three Macris' said attorney having formerly been associated in the same office with McKelvy."

Mrs. Curry: "Having formerly been associated."

The Court: You probably are arguing from facts which are not alleged in here. I am just taking the Complaint as it appears.

Mrs. Curry: Your Honor, that "Having worked in close harmony" means nothing more than conspiracy.

The Court: I am just trying to gather from [18] this pleading what the pleader had in mind.

Mrs. Curry: There is no allegation of fact showing that he worked in close harmony.

The Court: I agree with you that one might work in close harmony with one and do no wrong at all. And in this instance McKelvy might have worked in close harmony with counsel for the Macris without causing any harm to anyone.

Mrs. Curry: If he worked in close harmony with anyone, it was with the plaintiff, because he gave him all of the assistance he could.

There is no allegation of damage, though, in this Complaint.

> "There exists no civil action for a conspiracy, and particularly is this true in the national courts. An action may lie for damages suffered by reason of torts committed pursuant to a conspiracy but no action for damages lies for the conspiracy alone. 'The gist of such actions is not * * * the conspiracy, but it is the damages for which the wrongdoer and all who conspire with him are liable.' "

I submit there is no cause of action in conspiracy because, so far as McKelvy is concerned or anyone else, [19] there is no allegation of a combination or a preconceived arrangement which is necessary. There is no allegation of malicious intent. There is no allegation of damages. There is no allegation at all of a conspiracy except the word "conspire" which is simply a conclusion.

I would suggest that your Honor explain to counsel or to the plaintiff who has no counsel that on

these motions we restrict ourselves to the allegations of the Complaint and not to the evidence. I have an idea he has some evidence.

Mr. Croson: May it please your Honor, my name is Carl E. Croson. My associate, Willard Hatch, is now in the Superior Court and will be here before the hearing is concluded, I am sure. We represent the Continental Casualty Company, one of the defendants.

At the very opening of my presentation, if your Honor please, I just want to call attention to the places where the Continental Casualty Company, a corporation, is mentioned in this pleading. And, of course, our motion is directed to this pleading.

I don't know what the pleader might have in mind that he can plead, but this is the pleading that is before us and to which we are directing [20] our motion that it does not state facts sufficient to constitute a cause of action against the Continental Casualty Company.

Paragraph I alleges Continental Casualty Company is a corporation doing business in the State of Washington.

Then in paragraph II, that "during the times herein complained of defendants"—now, there are a number of defendants and when the word "defendants" is used we must have in mind that there are three Macris doing business as general contractors. Then there is W. R. McKelvy, the attorney complained of; the Continental Casualty Company, a corporation; A. J. Goerig and Clyde

Philp, individually. All of those are covered by the word "defendants."

The Court: At what line does that appear?

Mr. Croson: Paragraph II, page 1, line 19, "That during the times herein complained of, defendants conspired"—now, the word conspired is used—"to injure, defraud and damage Plaintiff in the following particulars."

Now, he sets out the Bill of Particulars, then, in which the Plaintiff complains that he had been engaged as a concrete contractor and general contractor. On or about the 15th day of March he [21] entered into a sub-contract with the Macris being the prime contractor. And then, under (b) that the Plaintiff posted bond as required and so forth.

In paragraph (c), in this Bill of Particulars as to what the Defendants did, "Macri and Company grossly breached the terms of said sub-contract by not paying sums due Plaintiff; by not furnishing suitable materials, by not supplying said materials timely."

Then in paragraph (d) the "Plaintiff thereupon retained the services of the law firm of Skeel, McKelvy, Henke, Evenson & Uhlmann of Seattle, Washington, and particularly the Defendant W. R. McKelvy, and made full disclosure."

About the middle of that and about lines 20 and 21, if your Honor please, the eye drops upon the words "Continental Casualty Company." And this is what is said: ——after citing the grading time and the meetings of the Defendant Macri and the Plaintiff—"out in the field on the project, all as

aforesaid; and that they"—apparently the "they" means Macris, so I will insert the word in my interpretation of the Complaint—"and that Macris were bonded by Continental Casualty Company with both performance and payment bonds," and he "sought the services of the [22] Defendant McKelvy."

Then in paragraph (e), in these particulars that are set out by way of which this injury and fraud was accomplished, "at all times from the date W. R. McKelvy, one of the partners in the said firm of Skeel, McKelvy, Henke, Evenson & Uhlmann, was first retained until the ultimate termination of his contract of employment on or about the 20th day of October, 1945." Now, he pleads a span of time from the date of his employment which, as your Honor has well pointed out, is not stated, "Until the 20th day of October, 1945." He "Took no action whatsoever to terminate said contract, or bring suit against said Macris for the reasonable value."

Then in paragraph (f) we have this language, about the middle of the paragraph, "Defendant McKelvy thereafter continued to delay the taking of any action whatsoever against the Defendants Macri and their bonding company as requested by Plaintiff," the Plaintiff, "became concerned" with the Statute of Limitations.

Then in paragraph (g), it says, "on the 20th day of October, 1945," the "Defendant McKelvy then informed the Plaintiff for the first time that he could not represent Plaintiff in any action

against [23] the Defendants Macri; that Macri Company was a good customer of Continental Casualty Company and that Continental Casualty Company was one of Defendant McKelvy's largest accounts." That is just a pleading, I take it, of the relationship existing between the Defendant McKelvy and Continental Casualty Company.

Paragraph (h). "Plaintiff thereupon retained the services of an attorney in Yakima, Washington, who promptly investigated the facts." He got an attorney in Yakima and the attorney made demand upon the Macris, the demand failing to produce results.

"That on or about the 14th day of December, said Defendants Macri filed a suit in the Circuit Court of the State of Oregon for the County of Multnomah." The Defendants Macri are not before your Honor today by any motion. But we did accept the pleading as a fact, filed the suit in the Circuit Court of the State of Oregon, the County of Multnomah, alleging damages which they had suffered by reason of Plaintiff's alleged breach.

In Paragraph (j). There is the allegation that this suit is in Multnomah County, Oregon, was malicious and wilful, without probable cause, and was [24] filed for the sole purpose and in fact had the effect of drying up Plaintiff's credit, causing him severe damage to his business in Portland, reducing him to such an impecunious financial condition as to make virtually impossible the filing of the threatened suit in Yakima.

There is no allegation at all that Mr. McKelvy

had any contact whatsoever with—had any legal relationship with the Macris. There is no allegation of any concerted action between Continental Casualty and Macris in Macris bringing their suit in Oregon. That suit was brought, I take it from reading the Complaint and using what ordinarily happens, Macris are under suit—claiming their damage by reason of an alleged fault.

Now, in paragraph (k) in this Bill of Particulars, that despite the filing of said suit in Multnomah County, Plaintiff did file—I don't know quite just what that means—but at any rate Plaintiff did file in Yakima, Washington, on or about the 20th day of December, 1945. The Plaintiff herein then appeared in said suit in Multnomah County, Oregon, and procured an order for the trial judge, dismissing said suit on condition Plaintiff file in Seattle, which Plaintiff did. [25]

"The trial Court in addition also advised the said Defendants"—the said defendants.

I think it is a reasonable inference that in this suit in Oregon that all of these parties were not Defendant; all of the Defendants in this case were not in that suit in Oregon. It was brought by Macris against the Plaintiff.

Then in paragraph (1). "After the filing of Plaintiffs' suit in Yakima, Washington, as aforesaid, against Defendants Macri and Defendant Continental Casualty Company."

Now, there is where the Defendant Continental Casualty Company first apparently comes into this picture in litigation. There is no allegation of anything else.

This suit filed in Yakima was a suit against the prime contractor and against his bonding company, a perfectly regular, normal suit. This was filed in Yakima, and that for the first time brings in the Continental Casualty Company as a party to any litigation. That is revealed to us in the Complaint in this paragraph. Then it goes on to say that the Continental Casualty Company, then, apparently in the case, revealed the fact that there were the Clyde Philp and A. J. Goerig, other defendants in [26] this action, too, who were joint venturers with Macris. That may or may not have been known to the Plaintiff but, if it weren't known, a courtesy was performed and the complete revelation of the whole situation was there.

So the suit apparently proceeded, then, against all of the defendants including Philp and Goerig, joint adventurers with Macris. That would make the three Macris and Clyde Philp and A. J. Goerig joint adventurers covered by this bond. Your Honor can see there would be several questions which readily could rise.

The next place that Continental Casualty Company is mentioned is in the last part of (1):

"Plaintiff also discovered, after the conclusion of the above suit, that Willard E. Skeel of the law firm of Skeel, McKelvy, Henke, Evenson & Uhlmann, appeared as attorney of record for Defendant Continental Casualty Company on the first day of the trial of Plaintiff's said suit in Yakima, Washington."

There is nothing pleaded, there, except that there were apparently two cases on trial that day. "And Plaintiff had no knowledge of said suit coming on for trial." It doesn't say that [27] he had any connection whatsoever with the matter or that he was interested in this suit in any way. The nature of that action is not revealed and, of course, there is nothing before us because there are no facts that make anything of that, and I assure your Honor there will be no facts to make anything of.

In paragraph (m) we have the word "Defendants" used at different times: "Full trial was had upon the merit of Plaintiff's Complaint, and of Defendants' Answer and Cross-Complaint."

The Court in Yakima found in favor of the Plaintiff who sued in quantum meruit and also entered a judgment in favor of the Defendants in the sum of $1.00 as to the Defendant's Cross-Complaint. The Cross-Complaint was Macris' Cross-Complaint, transplanted from the Oregon Court into this case at Yakima.

The next statement is this: "In furtherance of Defendants' concerted plan, appeal was taken from said judgment first to the Circuit Court of Appeals and finally to the Supreme Court of the United States, said litigation not being concluded until on or about the 9th day of November, 1949."

Now, there is certainly no conspiracy in carrying on litigation in a legal proceeding before the Court to [28] try the issues that may be involved between all parties. You have got a lot of parties, here. You have got the Plaintiff. You have got the Defendant,

and the original Plaintiff in the Oregon case. You have got joint venturers in the picture, and you have got a bonding company. There are a lot of questions. That case went through the Circuit Court of Appeals and, as the Pleader says, finally it went to the Supreme Court of the United States. Then the draft was finally paid by Continental.

I am interested, also, in reading this Complaint, to read particularly again in this "(n)"—all of these matters are set out from "(a)" clear down through—"That the Defendants conspired in the following particulars." Now, I still don't see any overt act. I still don't see any concerted action. The word concerted is used but where is the concert; where is the overt act; where is anything pleaded that says that these people did anything unlawful or did a lawful thing for an unlawful purpose or in an unlawful way?

In "(n)" again I am interested this way: "That all of the actions aforesaid were the result of concerted action by Defendants, and each of them,"—now, there comes a straight allegation by use of that [29] language, as far as Continental is concerned, and that is the first time and the only time, so far, that there has been a direct allegation as far as the Continental is concerned. But let's follow, "concerted action by Defendants, and each of them, in that"—and then come his limitations or the outgrowth of it—"in that Defendant McKelvy accepted the employment by Plaintiff"—and that is where he pins his law suit.

"That all of the actions aforesaid were the result

of concerted action by Defendants, and each of them, in that Defendant McKelvy accepted the employment by Plaintiff, yet his entire action was detrimental and antagonistic to the interests of Plaintiff, and should never have been accepted by Defendant McKelvy because of conflicting interests of his former and then present client, the Defendant Continental Casualty Company, and further in that Defendant McKelvy at all times herein complained of was fully aware of Plaintiff's precarious financial condition, of all facts pertaining to Defendants Macris' default, having personally gone upon the project on one or [30] more occasions to observe for himself the defaults complained of; and having worked in close harmony with the attorney for the three Macris said attorney having formerly been associated in the same office with McKelvy."

Well, if your Honor please, I do just feel like appealing a bit to your Honor's knowledge of what the Court can take judicial notice of. As firms are organized and as they work these days, there are a good many people that have been in my firm that have come and gone, and gone into business for themselves, and they are out.

There is no allegation, here, that that attorney had anything whatsoever to do with the firm of Skeel and McKelvy's office at the time. There is merely a statement that he had formerly been connected with the same office as McKelvy is connected with. There is not a single thing, there, that on a single statement in that paragraph when, after saying that all of the actions aforesaid were the

result of concerted action which the Defendants and each of them, and then details it. Now, he is bound by the detail, as far as this pleading is concerned. We are here on this pleading. I recognize that the Plaintiff is here representing himself, but [31] I don't think that changes the rule of the pleading. I don't think that changes the position that a person is in. He certainly has the right—and that is his Constitutional right—to appear and present his action. But it still must be pleaded within the rules of the Court.

Now, then, let us look at the next one. Now, he talks about the damages, and your Honor has—I see readily your Honor has very well in mind the law with respect to conspiracy. We all know that there is no magic about a conspiracy. It is simply this: That the parties get together, agree upon a program, there is an overt act to carry it out and the act of one of those groups—one of the group, then, makes it the act of all. There is no place, all the way through here—and I have tried to pick up Continental Casualty every place the eye falls on it—that the Continental Casualty Company did anything except in this one little allegation in the end where it says—I have it underscored, here, and call it to your Honor's attention—being the only time that it comes right down and says, "And each of them" in the 9th line on the page. Then he goes ahead, however, and eliminates them because he says, "In that" and then the whole Complaint is that the [32] Defendant McKelvy accepted employment when he shouldn't have accepted employment.

In (o) he goes ahead with damage. "That the damages hereinafter complained of were the direct and proximate result of the breach of the attorney-client contract of employment between Plaintiff and Defendant McKelvy, in that said Defendant McKelvy failed to advise Plaintiff that he represented Continental Casualty Company, which had or might have a conflicting interest, and by not performing the services which he undertook and agreed to perform . . ."

Your Honor has properly said that a contract, if breached, in connection with a concerted plan, a concerted program—I can conceive of this, that a group of people would get together, a group of business men might get together and one business man might say, "I have got an agreement that I am going to supply a certain amount of material to Mr. A. and Mr. A. has a contract that he has to carry out from Mr. B. and Mr. A. doesn't wish to do so." So he gets the supplier to breach the contract to furnish the material to him so that he is excused under the clause of causes beyond his control, and so the [33] material isn't furnished and the contract doesn't go ahead and damage results. I see that. That isn't this case at all.

This case says that the damages complained of were the direct and proximate result of the breach of the attorney-client contract of employment between the Plaintiff and Defendant McKelvy in that Defendant McKelvy failed to advise that he represented Continental Casualty Company, had some representation of them.

Now, even if there be a concerted plan, it takes an overt act to set it in motion. If there are no damages as a result of it, there is still no cause of action.

Mr. McKelvy is the one complained of. The Plaintiff says, in his complaint, that he became a little disturbed because of the possible running of the Statute of Limitations, so he got another attorney to look into it who immediately did look into it, who brought the action, who succeeded in the action, who recovered for him; and the fact that McKelvy didn't reveal his connection with Continental Casualty Company, the bonding company, does not in any way change the right of Macris or anybody else to carry on litigation and, had McKelvy brought the action, [34] there is no allegation that there would not have been appeals by Macris, who had no connection whatsoever with McKelvy. So the only damage that he alleges is this—because McKelvy didn't bring the action; somebody else brought the action. And litigation ran along. But there is nothing, there in this Complaint, that says that had McKelvy brought this action by some magic Macris would not have prosecuted this action.

And, of course, the bonding company could not in the course of litigation step out and say, "Well, Mr. Plaintiff, we are going to hand you this money that you ask for." They could not breach any contract which they had with their prime contractor. They could only run along with Macris until Macris and the Plaintiff had settled the litigation. And

when that litigation was at an end, with them named as a party, then they paid. Where is there anything, if your Honor please, that even makes a conspiracy; where is there anything in this Complaint that sets out a conspiracy? If we were to pick it out and just name it one, two, three, these folks got together at a certain time and did so and so and agreed upon a certain program; it isn't there. Where is the overt act that sets it in motion? The only overt act that [35] appears is that McKelvy didn't tell, didn't reveal. Now, under certain circumstances maybe, that the imagination might carry one to, that the failure to reveal something might be the very thing that would be desired to set in motion a conspiracy. It isn't so plead.

And then, besides, no damage resulted from that because he got an attorney in plenty of time; the attorney brought the action and was successful. And the bonding company paid when the two chief parties to the litigation had determined their differences, Complaint and Cross-Complaint—fault here and alleged fault there. When that was done, the bonding company paid.

If your Honor please, I don't see where there is anything in this Complaint that can possibly hold Continental Casualty Company as a party to this action, regardless of what the parties did, because they had nothing whatsoever to do except to follow along in this determination. They did not take over defense. There is no such allegation as that. This case is a matter of record. It is in the records of this Court. They did not take over

Macris' defense. Macris appeared and were defended and the parties were before the Court; and the Defendants Macri and Macri [36] and Goerig and Philp had their viewpoint as to whether they owed this money, and they had a right to litigate. Not until that was litigated and that right was determined in the Plaintiff to receive the money did the Continental have anything to do.

So, if your Honor please, I most respectfully do request your Honor to pass on the Complaint as is. I think we have a right in a conspiracy matter—it is just one of those cases, as your Honor well knows—it brings somebody into somebody else's quarrel so easily by alleging a conspiracy, that he concerted with them, but I think that action has to be shown.

The Court: Are you also raising the question of the Statute of Limitations?

Mr. Croson: Yes, the Statute of Limitations, if your Honor please.

The Court: And upon the authorities cited to me?

Mr. Croson: That authority will cover the same case. We have the same thing in ours, too, your Honor.

As far as the Statute of Limitations is concerned, inasmuch as it is the McKelvy action, that that came to an end when the employment ceased and unless there was something that these parties [37] concerted in, agreed upon prior to McKelvy's severance from the situation, there is no conspiracy that ever got as far as an overt act. I will go along

with your Honor on this—if three people got together and agreed upon a program and conspired to it, and then somebody dropped out, and then there is an overt act carrying out that agreement which they made, the man that drops out isn't relieved of the burden; no, I will follow that. But here is the point: There is no overt act that these parties, while they were associated—even though they were associated together—giving a broad inference to the Complaint——

The Court: You say that because there is no definite allegation as to what the conspiracy was?

Mr. Croson: No. And no definite allegation of the result that was done as a result of any agreement between these parties. I just don't see it, if your Honor please.

(Short recess.)

The Court: I will listen to Plaintiff, now.

Mr. Schaefer: Your Honor, I would ask whether I may be privileged to have my say from this table rather than in front because of the papers that I have spread out before me. [38]

The Court: Very well.

Mr. Schaefer: I am a layman. I am a concrete contractor. I haven't been able to secure an attorney to represent me in this cause. The attorney I had in the Yakima case has and did have information of the defaults throughout the job; the defaults of Mr. McKelvy in representing me and in the way that he left me set, and other things as the case came along.

At the time that we went to the Circuit Court of Appeals at San Francisco, I procured another attorney in Portland to work out matters with my attorney at Yakima and prepare for the appeal, and he also was fully informed of all the wrongs that I claim that Mr. McKelvy was the fault of happening. But after or during the course of our conversations, Mr. Olson, my attorney at Yakima, said, "Well, let's get on with this suit. We will get this suit out of the way, first, and then we will look into other matters."

After we were paid—that was in October or November of 1949—at that time, my nerves were pretty well frayed and I took a vacation. So I talked to my attorney, then, Mr. Hile, in Portland, and advised him to get things ready, that I wanted [39] him to—as soon as I got back from my vacation—file this suit which would probably be in the middle of March.

I thought he was preparing the materials for this suit. Shortly after I came back in March, this gentleman here, Pat Darcy—he was my superintendent on this job out here at Yakima—which by the way is not a dam job; it is an irrigation job. His mother-in-law had been housekeeper for an old attorney in Portland, and he passed away, so she had him help her to move certain stuff. The home I believe was left to her. And among the materials were some law books which, when I returned, Pat had down at my office in an orange crate. I asked where the books came from and he said where they came from, and he says, "I will turn them over to

you; I have no use for them." So it was from that time, or about at that time, that I started to prepare, after I became aware that progress wasn't being made by Mr. Hile toward filing the suit, and I started delving through the books, myself, and underscored much of the material in those books and had the estimator in my office and his wife type up this material. From it, I decided as to what kind of a case it really should be. [40]

As I say, I am not an attorney, and I know what they say about even an attorney representing himself in a Court case. But I feel there was so much wrong done in this thing that I owe it to myself and my conscience, and I owe it to other contractors that might meet up with the same situation, to just clear a thing like this up.

I have thought of not doing it, and I just wasn't able to sleep.

You might think I should have been more fully aware and progressed with the preparation of such a suit sooner than I did, but I had an attorney and I figured that——

The Court: I anticipate what you are telling me, now, is an explanation as to why you haven't filed the suit sooner in so far as that bears upon the Statute of Limitations.

Mr. Schaefer: That is right.

The Court: Mr. Schaefer, the legislature of the State has made the law. And this being a diversity case, this Court is obliged to follow the rule in the State of Washington.

Counsel has cited to me the section of the Statute

and also a decision which counsel informed me holds that the period of the Statute of Limitations in [41] a conspiracy case is two years. You have heard me make the statement to them that, as I understood the law, that the two years started from the last overt act of the conspirators in futherance of the agreement of conspiracy.

Assuming that you have alleged a conspiracy, here, when is the last overt act of that conspiracy as it appears in your Complaint?

Mr. Schaefer: May I make a statement before I go into that?

The Court: Of course, I am precluded from going into the background of matters that may appear in this record. We are not trying the case, now. All we are trying is whether your pleading is sufficient as a matter of law.

Mr. Schaefer: I want to state, here, I understand from Section 155 of Remington's Revised Statutes that where an objection is made, based on the Statute of Limitations, objection that the action was not commenced within the time limit can only be taken by Answer or Demurrer, if the Court sees fit to sustain this matter on a question of the Statute of Limitations.

I would like to ask the privilege of a 30-day time limit for the purpose of filing an [42] amended Complaint because I believe I can file the Complaint in accordance with the facts which is not barred by the Statute of Limitations.

The Court: The substantive law of the State in this Court and, if the two-year limit applies, that

governs me. But the procedure law is governed by the Federal Rules of Procedure. Under the Federal Rules of Procedure, the Statute of Limitations may be raised by a motion to dismiss as counsel have raised it in this case. So what you read, there, would have no application at all in this Court.

Mr. Schaefer: In a fraud case, I understand that in 159, paragraph 4 of Remington, that it is three years.

The Court: Aren't you attempting to allege, here, in this Complaint, a conspiracy, that these several defendants conspired and entered into an agreement to commit a wrong upon you?

Mr. Schaefer: Yes, I am.

The Court: If it is a conspiracy case, then I would suggest that you look into the very question I have been presenting to you, namely, does not the 2-years Statute of Limitations apply? They have cited one Federal case interpreting, as I understand the [43] the Washington Statute, and which they represent to me holds that the 2-year Statute of Limitations applies in a conspiracy case?

Mr. Schaefer: I have the analysis—or the statements here—and then an analysis.

The Court: Let me make this suggestion to you, Mr. Schaefer? Apparently from what you say; your reply or lack of reply that there is no allegation in this pleading of an overt act or anything done in furtherance of the conspiracy within the 2-year period immediately preceding the filing of this Complaint, and that the 2-year period of Limitations applies, the Motion to Dismiss as to each of these moving defendants would be good.

In granting the Motion, I would also grant you time within which to file an amended Complaint, if you can, setting forth and overcoming this question of the plea of the Statute of Limitations. If you did that, you should go into your Complaint and set forth, first, the agreement between the parties—the unlawful agreement—when it was entered into and what were the terms of that agreement; what did these Defendants agree to do—and then set forth what they did in furtherance and in carrying out that agreement; and then you should allege from that the [44] damages with connection between the act done or the acts done and the damage.

You see, in your Complaint, now, you don't definitely and unequivocally allege an agreement which precedes any of these acts done. There is no allegation in here what the agreement was. Toward the end you say that certain damages were sustained as a result of the concerted action. But a concerted action may result in damage and still not be actionable. It would have to be concerted action pursuant to an unlawful conspiracy against you.

Mr. Schaefer: Mr. McKelvy had the information of when the contracts were signed. I will go through the dates at which various contracts——

The Court: Well, I am only interested in the dates as you allege them, here. I have made a notation of those. As I pointed out to opposing counsel, you don't allege the date that you retained Mr. McKelvy.

Mr. Schaefer: The date that I retained Mr. McKelvy was——

The Court: Now, you are going outside of this record. I am just trying to point out to you troubles that you have in this pleading. Now, you allege there was a delay but you don't allege how [45] long the delay was. That won't appear unless you allege when you retained Mr. McKelvy. You do allege when you discharged him.

Mr. Schaefer: He let himself out. If I may, I had a conversation with Mr. McKelvy. He came to my office on August 16th last.

The Court: Then you should allege what he agreed to do for you. Did he agree to represent you in litigation or did he agree to try to get a settlement for you or investigate it? What did he agree to do?

Mr. Schaefer: He agreed to do those things necessary.

The Court: Then you should allege that. You see, you haven't alleged what he agreed to do.

Mr. Schaefer: Your Honor, I am not an attorney and I haven't been able to get one. I have contacted the President of the Bar Association, here; I talked to the Assistant Attorney General down here at Olympia. I have tried in just every way. The attorneys—as with Mr. Olson, he said, "I think you have a good case but if you are going to name Mr. McKelvy, I can't interest myself in this thing," and he just stepped out of it. He said, "Can't you file this action and leave him out and he can be subpoenaed?" [46] And I said, "Why

should I?" He is the one that did me the greatest wrong; he knew of these things; and as a result of his not taking those actions which I know that he knew of and in his own office memo, a memorandum made up in his office, there is proof of his knowing that I had a good right to get out of that or to quit that contract, and he did nothing about it. So I said, "He is the greatest wrongdoer. Why should I not name him just because he is an attorney?"

The Court: I try to surmise what could be the damage you sustained from this. You allege, however, after you state Mr. McKelvy refused to go ahead and represent you in the litigation, that you obtained some other lawyer. You allege, therein, that you were successful and that you obtained judgment for what was granted or asked for in that action. I assume from that you obtained the damages that——

Mr. Schaefer: No, your Honor, I obtained the cost of the job, itself.

The Court: In other words, you were recompensed fully for any fault or breach by these Macri brothers of your contract?

Mr. Schaefer: No, your Honor. I was only [47] recompensed for the cost of doing the physical work on the job. My cost in the prosecution of this first cause, there, is over $44,000 that I did not get anything for.

The Court: All of those matters were in issue in that case, were they not?

Mr. Schaefer: No.

The Court: Well, they should have been.

Mr. Schaefer: They couldn't be, your Honor, for the reason, here, that the bonding company in the first instance is only liable for the materials and the labor that goes directly into the construction. I was informed by Mr. McKelvy that Macri had his assets hidden. I was informed or we didn't know until after the suit was filed in Yakima that Philp and Goerig were silent partners. In there we found that they had a termination agreement which took place after I had a couple of meetings in the field with Mr. Macri about his breaches of his contract.

The Court: Well, taking this Complaint—and that is all I can take in ruling upon these motions—you allege that you brought suit against Macris and were successful and that you collected the judgment therein. Of course, there is no allegation there of any loss by you of anything that Macri might [48] have done or not have done—any breach by him of the attorney-client relationship with you. If there was any damage sustained by you in addition to that, there should be appropriate allegations. As far as the allegations are concerned, it appears to me that no damage was concerned—merely from the delay in bringing that suit; and that you had full recovery from any loss you sustained in your relations with the Macri people.

Mr. Schaefer: I would like to read this.

The Court: Now, again, you are going to take me into evidence, things which may be brought out in the trial of the case. They are not pertinent here.

Mr. Schaefer: In other words, he came down there to get some money on the account—on his account—and while he was there, we had conversation for an hour and five minutes and during the course of that conversation he asked me three times about paying him some even small amount so he could clear his books on it. He came down a few days after a letter from Olson went out to Holman's office stating the reason why we would—why he would not release the cost bond that Macri had put up in filing in the Circuit Court of Appeals. So from that it appears [49] to me that the information from the Holman office went to McKelvy; and subsequent to this and on account of that a few days later McKelvy came down to my office and I believe that would indicate very clearly that if I had paid him any money on it, at all, I could not have brought him into this action.

While he was at my office, he pulled his handkerchief out of his pocket and wiped his brow. He put his handkerchief back in his pocket and then he brought it out again a third time. Then he wiped his brow three times before putting it back in, and then he put it back in once more. So he was sweating about something. I imagine if I had paid him any money on it——

The Court: The fault of your argument, in which you advance evidenciary matters to me, is a fault I find in your Complaint. There is so much evidence you put in this. You shouldn't allege evidence. You should allege what we call the ultimate fact; namely, these parties agreed in some form, alleging how they did it, and that they did these

things to injure and harass yourself, and then that they did certain things in furtherance to carry out the unlawful agreement and combination. You haven't alleged those clearly. You allege a lot of [50] evidenciary fact that may come into the trial of the case. In some instances you don't even allege they were done in furtherance of any conspiracy. The main fault is that you haven't alleged unequivocally a conspiracy or agreement between the parties.

Mr. Schaefer: I had given McKelvy all of the dates and the wrongs, that is the breach of the contract by Macri which it has been proven that it was wilful and negligent, as Judge Driver decided it, and that such breach started from the beginning of the contract to the completion by us of that portion of the job, and those breaches were then in existence.

When I talked to McKelvy about it, he said, "Well, I don't know; we can't really—the bonding company won't have to—it would be pretty hard to have the bonding company pay on this." He told me that, as far as Macri having to pay, it would be this is in the contract and that is out of the contract.

I told Mr. McKelvy about two meetings that we had in the field wherein Mr. Macri had promised to pay the additional costs of any work that we were to do and I argued that with him and I told him we didn't have the organization to do this additional work and for him to go ahead and see that he got his [51] work done according to the contract.

So all such information was given Mr. McKelvy. We had a meeting in Holman's office in which Mr. Holman, the attorney for Macri, admitted that if the excavations were being paid for according to the specifications, and that Macri was making his excavations as I stated, that we would then have a good, legitimate claim against Sam Macri Company. That information and other was information that McKelvy could have had. He could have had the information that Philp and Goerig were silent partners and that Philp was the attorney, in fact, for Continental Casualty Company; and then, later, a few days later, became a party to this contract. He could have had the information through the bonding company, surely, that they tried to get out of the silent partnership arrangement with a termination agreement; and in this termination agreement they did get out of the obligation as to us. That is at the time that I was pushing McKelvy, all along, to get a suit filed. I told him when I went in there, I said, "They have breached this contract thus and so and I want to terminate it. I can't carry on." I told him all of the facts about my financial condition and how the job was progressing and at what time I was supposed to be through with the [52] job which was never denied. I was supposed to have been able to complete that job by September 15th, not only that but a second job. The second job they did not start until about 10 months after they were supposed to have started the job; and on this second contract the Macris and also on the first within 30 days after signing the contract

they were supposed to commence work. On the second contract they did not commence work for about 10 months, and yet they filed a suit.

If McKelvy had done—which his office memo indicates as to the information that I had given him—and had he done what he, himself, admits that I had a good cause of action here in quantum meruit and that perhaps the best thing for me to do was to quit work; had he done that, then I would have been able to stop work, there, and have gotten into the suit, if necessary, and gotten paid for my work and gone on with my other work. But instead of that, and through his negligence in doing so, from November 1, 1944, to the time on October 20, 1945, he just alibied me along, so to say, and told me that I would have to complete the job and if I didn't Macri could go in and complete the work and send his bill to my bonding company, and my bonding company would wipe me out. [53]

Had he, though, gone ahead and completed that, all of this other difficulty would not have arisen. And after the Macri Company—after we had threatened the filing at the conclusion of the job, after we were through with the job which we finished up in April, I think, the 8th, of '45, after that time—let's see, I am losing the thread, here—after that time Mr. McKelvy advised me to turn over my assets and everything of value, over to my brother Bill or someone that I could trust, and told me of how he had handled the case for another contractor in which a bank lost $83,000 and the contractor still operated. At that time, I told him that the road

ahead of me was maybe narrow and long and rough as hell—that is quoting from our conversation—but that that was the only road I was traveling.

He had told me, then, he said, "In that way you will get rid of your obligation with Uncle Sam, with the Internal Revenue Department and all other old accounts." I told him no, I wasn't doing anything of the kind.

Then later I had a meeting with Mr. McKelvy at his office for 11:30, I believe it was, and we didn't do any more than shake hands and bid the time of day when he told me that he had a luncheon speaking [54] engagement. So we left the office and the arrangement was that we were going to be back at 1:15. I was back a little before that and the office girl asked me whether I was to see Mr. McKelvy and I said, "Yes." And she said, "Well, he isn't going to be back any more today." And I said, "Yes. He was to be back at 1:15; that was our agreement when we left for lunch." Along about 1:20 or 1:25 she said, again, "I don't think he is going to be back. I am quite sure he went out to his new home." I said, "What is the telephone number?" And she said, "I don't know; no, he doesn't have a telephone number out there, yet." I asked what the address was and she said she didn't know. I asked whether anyone else in the office knew the address and she said, "No, I am sure that no one does." So I waited there until 3:30 and then went home. And then just a couple of days after that I again had an oppointment with Mr. McKelvy. And at that time I was shoving to get this

suit filed. Then Mr. McKelvy first informed me—he informed me, then, that he couldn't represent me any further; that Continental Casualty Company was one of their largest accounts and that Macri Company was one of Continental Casualty's good customers.

I asked him, "Well, what limit have I got? [55] By what time must I have a suit filed?" And he said, "Well, you still have about a month." Then I felt more like doing something else, I will assure you, but I asked him whether he knew of some good attorney, then, in Yakima, so he named, I believe, four of them. And the third man that he named was Mr. Olson. So a friend of mine that had been Vice President of the Northwest Title Company at Spokane, he had—during the course of this job there in about July of '44—heard that I was having difficulty and that Macri was going to bring someone from down in his home town; in other words, Mr. Walker had given a foreman for one of the construction companies, there, in Yakima, a ride into town or out toward his home and it was evident that Mr. Walker wasn't too well acquainted with the addresses, I guess, and Walker told him he had come up from Portland——

The Court: Well, Mr. Schaefer, I am going to have to stop you. I know you are not a lawyer, but you are going into matters that are outside of anything that I can consider. I have tried to tell you that evidenciary matters are not before me. There is just the question of pleading before me. If you have got something to tell me or present to me [56]

in reply to the arguments made by counsel for the defendants, I will listen to you, but I can't listen to this evidenciary matter that you are telling me. Your principle grievance seems to be against Mr. McKelvy. If it were alone as against him, as far as your Complaint is concerned, the breach of his contract with you occurred in 1945—I think you said in October or November.

Mr. Schaefer: But all of these other things flowed from——

The Court: Now, just a minute. If that is the sole basis of your cause of action against McKelvy, the Statute would have clearly run against that. If you are keeping him in through a conspiracy, as I say, you must allege plainly and unequivocally what that agreement was and that it antedated any of these acts that you speak of. Then you must allege that these acts were in furtherance of that conspiracy. You must allege, as I say, what the conspiracy was—what did these people agree to do? Those allegations must be sufficient to show what they agreed to do as to an unlawful act or to accomplish a lawful act through unlawful means. You haven't done that.

As far as the Statute of Limitations is [57] concerned in connection with the conspiracy, I again state to you that the statute, as I understand the law, runs from the last overt act done in furtherance of the conspiracy and in carrying out the agreement between the parties. You can allege in an amended pleading an overt act done within the period of limitation and that, of course, would

overcome the vulnerability which is present in your pleading.

I will be obliged to grant these motions and I do it with the provision that you may have a reasonable time within which to file an amended pleading. How much would you want? Would you want as much as 30 days?

Mr. Schaefer: If you please, your Honor.

The Court: I will permit you to have 30 days within which to file an amended Complaint.

Now, counsel has mentioned to me the rule which requires a non-resident—it is a local rule pertaining to this District—which requires a non-resident to post a bond in the sum of not less than $250. You have not done that, and you could not maintain the suit without complying with that rule. Counsel has suggested and requested the Court to make the bond in a sum in excess of $250, having in mind [58] that the rule places in the Court the discretion as to the amount of the bond, the minimum being $250.

What reasons have you to give me that $250 would not cover the costs?

Mrs. Curry: There are two appearances, those of the Macris and Philp and Goerig, and I don't think $250 would cover all of our costs. I suggested that it should be $500. There is no more difficulty in posting the $500 but it gives us more security, that is all.

The Court: You see, non-resident litigants, under the rule, are in an unfavorable position. A resident litigant would not be required to post that

bond but a non-resident litigant is required to do it. You being a resident of Oregon come within the definition of the non-resident litigant.

Mr. Schaefer: That is a local rule, here?

The Court: It is a local rule, yes.

Mr. Schaefer: At that time, in Yakima, I don't think we had to. I was unable to make bond with the bonding companies in the past; and to post a certified check would be proper, would it? I don't know that a bonding company would post a bond for me in this.

The Court: I have no authority to dispense [59] with it. The rule is there and I must require that it be complied with.

Mrs. Curry: I think, your Honor, he could file a certified check payable to the Clerk.

Mr. Schaefer: Why I bring that up is because——

Mrs. Curry: It would be satisfactory to us. All we want is our security, that is all.

Mr. Schaefer: We were trying to secure a bond for bidding on some other work, down there, and I was informed by the insurance company or my bondsman that I couldn't secure a bond as long as I was involved in litigation with any bonding company.

The Court: In that rule is there anything to the effect that the Court may increase the amount of the bond?

Mrs. Curry: Yes. The Court may require an additional.

The Court: An additional bond?

Mrs. Curry: Yes. But I think we can only make it when one bond is filed. I don't think we can come in continuously.

The Court: Well, I am going to order that he comply with this Rule 50 and file a bond in the sum of $250. If this rule says that a bond in the sum of $250, no approval therefor is necessary. After the [60] bond has been filed, any opposing party may raise objections to its form or to the sufficiency of the surety for determination by the Clerk.

So the order of the Court will be that the Plaintiff file within 15 days a bond in the sum of $250. The two motions which have been presented to me are and each of them is granted. The Plaintiff may have 30 days within which to file an amended Complaint.

Mrs. Curry: Your Honor, may I address the Court? It has been rather hard for me to listen to certain statements made outside of the record with reference to Mr. McKelvy. I would just like to make this statement or put it in the form of a question and ask Mr. Schaefer if he did not come into our office at the behest of his own bonding company on an entirely different matter?

The Court: I think that request of yours is inappropriate.

(Concluded.)

(At 11:52 o'clock a.m., Thursday, January 11, 1951, proceedings in re Motions concluded in the United States District Court.)

[Endorsed]: Filed April 16, 1951. [61]

In the District Court of the United States for the Eastern District of Washington, Southern Division

Civil No. 246

THE UNITED STATES OF AMERICA for the Use of M. C. SCHAEFER, an Individual Doing Business as CONCRETE CONSTRUCTION COMPANY,

Plaintiff,

vs.

SAM MACRI, DON MACRI, JOE MACRI, A. J. GOERIG and CLYDE PHILP, Individuals and Co-partners Doing Business as MACRI COMPANY, and CONTINENTAL CASUALTY COMPANY, a Corporation,

Defendants.

RECORD OF PROCEEDINGS AT THE TRIAL

Be it rembered, that on the 21st day of February, 1947, the above-entitled cause came regularly on for trial in the above Court at Yakima, Washington, before the Honorable Sam M. Driver, Judge of said Court, sitting without a jury; the Plaintiff not appearing; the Defendants Sam, Don and Joe Macri appearing by Tom W. Holman, of Brethorst, Holman, Fowler, and Dewar, of Seattle, Washington; The Defendants, A. J. Goerig and Clyde Philp, appearing by Kenneth C. Hawkins, of Brown and Hawkins, of Yakima, Washington; the Defendant, Continental Casualty Company, a corporation, ap-

pearing by Willard E. Skeel, of Skeel, McKelvy, Henke, Evenson & Uhlmann, of Seattle, Washington, and the following proceedings were had:

The Court: This same question is involved in all of the cases here against the Macris and the Continental Casualty Company, but I wonder if we shouldn't proceed on the record here in one of the cases, and then stipulate, if counsel is willing to do that, that it may apply in all of the cases?

Mr. Holman: Yes, your Honor.

The Court: Is there any particular preference, then, as to the case we should select for the record at this time?

Mr. Holman: I think not.

Mr. Hawkins: 257, I think that's the one that has the letters involved in it.

Mr. Holman: Well, in the event counsel feels that way, let's take 255.

Mr. Hawkins: Case 257 has these letters in evidence, as to which we've made a special point, and will continue to make a special point.

The Court: Yes, I think that is true. Let's take 257; it has that question that isn't involved in the others.

* * *

Mr. Holman: Call Mr. Goerig to the stand. I am calling him under the rule, your Honor, as an adverse witness.

A. J. GOERIG

one of the defendants, called as an adverse witness on behalf of the defendant Macri, being first duly sworn, testified as follows:

Direct Examination

By Mr. Holman:

Q. Mr. Goerig, you are the Goerig mentioned in the papers which have been read to the Court here? A. Yes.

Q. I'll ask you whether or not you received a copy of Macri's Exhibit for identification 3, this statement of account that I had a moment ago?

A. I can't say that I did, no. I was never active in the office work. I was on the outside, normally.

Q. And who was active in the office work?

A. Mr. Philp.

Q. Mr. Philp handled the office work and you handled the outside?

A. Mr. Philp handled the office details and I handled the outside.

Q. And had you ever seen that before today?

A. I can't say whether I did or not. I've seen lots of reports and financial statements, but I wouldn't swear to that.

Q. When did you know that Sam Macri had made an assignment to the bank of his rights under these joint venture agreements to secure his loan at the bank? The one I'm saying is the same bank all the time, your Honor, Seattle First National Bank.

(Testimony of A. J. Goerig.)

A. Oh, it was—I couldn't say; it was over a year ago I think. I never saw the assignment, but they were always bringing it up in conversation when I was in the bank.

Q. That is, the bank was?

A. The bank was, and they kept—well, they kept asking about it. If I may go on, I can describe how I knew about the assignment. They were after us to pay, and we refused until the loss was determined on the job.

Q. Mr. Goerig, that is the one other question I wanted to ask you, whether or not to the best of your knowledge and belief there has been any payment made by Philp and Goerig on specifications 1062 or specifications 1068, covered by these Plaintiff's Exhibits A and B?

A. That is on these two jobs in question here? Not to my knowledge.

Mr. Holman: That's all.

Mr. Hawkins: That's all, Mr. Goerig.

(Whereupon, there being no further questions, the witness was excused.)

* * *

Mr. Hawkins: Mr. Goerig, will you take the stand, please?